(29,032)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 482.

LOUIS KLEBE AND JULES KLEBE, COPARTNERS, TRADING AS L. KLEBE & COMPANY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 12, 1923.

Court of Claims.

No. 34638.

ouis Klebe and Jules Klebe, Copartners, Trading as L. Klebe & Company,

vs.

The United States.

I. HISTORY OF PROCEEDINGS.

On June 23, 1920, the plaintiffs filed their original petition.
On August 19, 1920, the defendant filed a demurrer to said etition.
On October 25, 1920, the demurrer was argued and submitted by r. W. D. Harris, for defendant, and by Mr. Daniel C. Donoghue, r plaintiffs.

II. ORDER OF COURT.

Entered Nov. 8, 1920.

This cause coming on to be heard, was submitted upon the defendant's demurrer to the plaintiffs' petition. On consideration hereof, the Court being of opinion that the petition should be made more specific, does hereby remand the case to the calendar, with the right to the plaintiffs to state in its petition whether or not the work upon which the steam shovel claimed by plaintiffs was used was completed and the Construction Officer of the Government ought to exercise an option to purchase the construction plant.
All other questions are reserved. By the Court.

III. PETITION AS AMENDED BY ORDER OF COURT OF NOVEMBER 8, 1920.

Filed by Leave of Court December 22, 1920.

To the Honorable the Chief Justice and the Judges of the Court of Claims:

Your petitioners, Louis Klebe and Jules Klebe, co-partners, trading as L. Klebe & Company,
Respectfully represent:

I.

That the petitioners, Louis Klebe and Jules Klebe are co-partners, trading as L. Klebe & Company, citizens of the United States, and residents of and doing business in the city of Philadelphia, State of Pennsylvania.

II.

That your petitioners have always borne true faith and allegiance to the United States, having always and at all times been loyal citizens thereof and have never been guilty of any act or acts of disloyalty to or towards the Government of the United States.

III.

That your petitioners are the sole owners of the claim herein presented and sued upon, no part thereof having at any time been assigned or transferred.

IV.

That between April 6, 1917, and November 11, 1918, the United States was engaged in a great war with the German Empire in Europe, on the high seas and in other parts of the world.

V.

That at and prior to May 12th, 1918, and subsequently thereto the United States was constructing, under a contract with Bates and Rogers Construction Company, an Inland Storage Depot, at New Cumberland, Pennsylvania, for use in the prosecution of the then pending war, and in the construction of said depot, steam shovels were used.

That on May 12th, 1918, your petitioners entered into a verbal agreement with the Bates and Rogers Construction Company, whereby your petitioners leased to the said Bates and Rogers Construction Company one Erie Traction Steam Shovel, for
4 which Bates and Rogers Construction Company were to pay your petitioners a rental of $25.00 per day, payment of all operating charges and all transportation charges to be made by the lessee, and the shovel was to be returned to your petitioners in as good condition as when received, allowance being made for ordinary wear and tear. Delivery of the shovel was then and there made by your petitioners to the said Bates and Rogers Construction Company, upon the aforesaid terms, and without a formal lease being at that time signed.

That subsequently, on May 20th, 1918, your petitioners signed a lease, dated May 18th, 1918, between themselves, as lessors, Terwilliger Equipment Company Agent, and Bates and Rogers Construction Company, lessee, which provided for a rental of $25.00 per day, to be paid by the said Bates and Rogers Construction Company to your petitioners for the use of the said shovel, the payment by the said lessee of all operating charges and of all transportation charges, including the unloading charges when the shovel was returned. After the execution of the said agreement by your petitioners, as lessors, three copies of the lease were sent by the said

Terwilliger Equipment Company to Bates and Rogers Construction Company, at New Cumberland, Pennsylvania, in a letter dated May 21, 1918. A true and correct copy of said agreement is hereto attached, made part hereof and marked Exhibit "A"; and a true and correct copy of said letter of May 21, 1918, is hereto attached, made part hereof and marked Exhibit "B."

Thereafter, to-wit, on June 3, 1918, Bates and Rogers Construction Company sent a letter to Terwilliger Equipment Company, enclosing regulation contract for said Erie Steam Shovel, the property of your petitioners, stating: "The contents of your contract have been incorporated in the copies which we are sending you." Kindly have Klebe and Company execute four copies and return to us." A true and correct copy of said letter of June 3, 1918, is hereto attached, made part hereof and marked Exhibit "C."

Relying on the statement of Bates and Rogers Construction Company that the contents of the contract of May 18th, 1918, were incorporated in the regulation form of contract, your petitioners executed the latter contracts, sent to them by Bates and Rogers Construction Company through Terwilliger Equipment Company, and at the time of the execution of said contracts the shovel had already been delivered by your petitioners to Bates and Rogers Construction Company at New Cumberland, Pennsylvania, and had been accepted by the said Bates and Rogers Construction Company—both your petitioners and the said Bates and Rogers Construction Company acting, at that time, under the terms of the verbal agreement hereinabove referred to.

On June 15th, 1918, the said Terwilliger Equipment Company wrote Bates and Rogers Construction Company, enclosing what was termed by the latter as the regulation form of the contract, executed by your petitioners, and requesting Bates and Rogers Construction Company to execute the same. On June 17th, 1918, Bates and Rogers Construction Company wrote the said Terwilliger Equipment Company enclosing copy of the said contract, signed by themselves. A true and correct copy of said letter of Terwilliger Equipment Company to Bates and Rogers Construction Company, dated June 15th, 1918, is hereto attached, made part hereof and marked Exhibit "D." A true and correct copy of the letter of June 17th, 1918, from Bates and Rogers Construction Company to Terwilliger Equipment Company, is hereto attached, made part hereof and marked Exhibit "E." A true and correct copy of said agreement referred to in Exhibits "D" and "E," and executed by your petitioners, and by Bates and Rogers Construction Company, as lessee, is hereto attached, made part hereof and marked Exhibit "F."

VI.

That the United States was not a party to any of the aforesaid agreements, and acquired no enforceable rights thereunder.

VII.

That the rental of $25.00 per day for said steam shovel, fixed both by the verbal agreement and by the said written agreement, was a fair, normal rental value for the said shovel, with an obligation on the lessee to pay all operating charges, transportation charges, and to return the shovel to the lessor in as good condition as when leased, and without any right on the part of the lessee thereof to apply rentals paid thereunder on account of a declared valuation thereof, or purchase price for the said shovel.

VIII.

That thereafter, to wit, on or about November 5th, 1918, the United States, acting under and by virtue of the Emergency War Legislation, appropriated for its own use, the said Erie Traction Steam Shovel, Number 74, as equipment, materials or supplies, connected with the prosecution of the then pending war.

IX.

That at the time the said shovel was appropriated by the United States, for its own use, the said shovel was the property of
7 your petitioners, and was of the fair value of $5,000.00.

That at the time of the appropriation of said steam shovel by the United States, the work upon which the steam shovel was being used by Bates and Rogers Construction Company had not been completed; that the contract between the Bates and Rogers Construction Company and the United States was not completed until December, 1918; and that the Construction Officer of the Government did not take over the entire plant, but only such parts of the same as he desired.

X.

That the amount of rentals paid to your petitioners by the said Bates and Rogers Construction Company, lessees of the said steam shovel, was $4,225.00, and that the same was a fair, reasonable and just rental.

XI.

That subsequently L. Klebe & Company, your petitioners, through Daniel C. Donoghue, Esq., their attorney, made claim upon the United States, before the Board of Contract Adjustment, duly authorized representative of the Secretary of War, to hear and determine doubts, disputes and claims which are not disposed of by mutual agreement, under the Act of Congress, Approved March 2, 1919, entitled "An Act To Provide Relief in Cases of Contracts Connected With The Prosecution of the War, and For Other Purposes."

XII.

That the said Board of Contract Adjustment of the said War Department, after taking testimony in the said case, under its Number 150-c-1600, Class B Claim, awarded to your petitioners, L. Klebe & Company, the sum of $775.00, the difference between the agreed value of $5,000 and the rentals previously paid of $4,225, as set forth in paragraph X hereof.

XIII.

That no claim has been filed by your petitioners, L. Klebe & Company, with any officer of the Treasury Department or
8 any other Department of the United States Government, for the amount hereinafter claimed, or any portion thereof, except as hereinbefore set forth.

XIV.

That your petitioner is unwilling to accept the said award of $775.00 of the said Board of Contract Adjustment of the War Department of the Government of the United States, and is unwilling to accept the adjustment, payment or compensation offered by the Secretary of War.

XV.

Your petitioners, L. Klebe & Company, pray that by reason of the aforesaid allegations there is now lawfully due them from the United States the sum of $5,000, the lawful value of the said steam shovel, and that there exists in favor of the United States against your petitioners' claim no set-off or counter-claim of any kind or description.

Wherefore, your petitioners pray judgment against the United States in the sum of $5,000.00. Louis Klebe, Jules Klebe, Trading as L. Klebe & Company. Daniel C. Donoghue, Attorney for Complainants. James M. Dohan, Of Counsel.

9 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Louis Klebe, being duly sworn according to law, deposes and says that he is one of the above named petitioners and in actual and active charge of the petitioners' business, that he has read the foregoing petition and knows the contents thereof, that all the statements made in the said petition are within the knowledge of your deponent and are true. Louis Klebe.

Sworn and subscribed to before me this 18th day of June, A. D. 1920. [Seal.] Michael A. Maloney, Notary Public. My Commission expires March 12, 1921.

10 **EXHIBIT "A."**

Philadelphia, Penna., May 18th, 1918.

Memorandum of agreement, made this eighteenth day of May, nineteen hundred and eighteen, by and between L. Klebe & Company, Philadelphia, hereafter called the Lessor, Terwilliger Equipment Company, Philadelphia, Agents, and Bates & Rogers Construction Company, New Cumberland, Penna., hereafter called the Lessee, witnesseth:

The lessor hereby lets unto the lessee and the lessee hereby hires from the lessor the following machinery, to wit:

One (1) Erie Traction Steam Shovel—Shop No. 74—Inspected and accepted by Mr. Oscar Sackerson, Representative for the lessee.

It is mutually understood and agreed that the rental shall commence on the date of bill of lading showing shipment and cease on date of bill of lading showing return, rental to be twenty-five dollars ($25.00) per calendar day, payable every fifteen days from date of bill of lading showing shipment.

It is further understood that a first class operator shall be in charge of the machine at all times, also that this machine is to be returned in as good condition as received, allowance being made for ordinary wear and tear. All parts broken or damaged during use by the lessee to be replaced free of charge to the lessor by the lessee.

It is mutually understood and agreed that the lessee is to pay all loading charges incurred by the lessor in shipping this shovel, also shovel operator's time including railroad fare and meals until he reaches New Cumberland, Pennsylvania, after which time he
11 is to be placed on the lessee's payroll. Lessee is also to pay all unloading charges when shovel is returned. It is further agreed that lessee is to pay freight from Philadelphia to New Cumberland and return. Valuation on this shovel to be five thousand dollars ($5,000.00).

Should there be any breach of this contract by the lessee it is mutually agreed that the lessor has the privilege of entering on the premises of the lessee and taking possession of said shovel, charging the lessee with any expense in connection therewith.

In witness whereof, the parties hereto have respectively set their hands and seals this twentieth day of May, nineteen hundred and eighteen. L. Klebe & Co., Lessor, by —— ——. Terwilliger Equipment Company, Agent, by —— ——. Bates & Rogers Construction Co., Lessee, by —— ——. Witnesses: —— ——.

EXHIBIT "B."

May 21, 1918.

Messrs. Bates & Rogers, New Cumberland, Penna.

GENTLEMEN: We are enclosing three copies of lease cover-
12 ing Erie Traction Shovel and would kindly ask you to sign same returning the original and one copy for our files. Yours very truly, Terwilliger Equipment Company. HEG. MMF.

EXHIBIT "C."

Chicago. Cleveland. Spokane, Wash.

Bates & Rogers Construction Co.,

Civil Engineers and Contractors.

New Cumberland, Pa., June 3, 1918.

Terwilliger Equipment Co., Philadelphia, Pa.

GENTLEMEN: We are enclosing regulation form of contract for the Erie Steam Shovel, which according to contract prepared by you, is the property of L. Klebe & Co.

The contents of your contract have been incorporated in the copies which we are sending you.

Kindly have Klebe & Company execute the four copies and return to us. Yours truly, Bates & Rogers Construction Co. E. P. Lenahan, Vice-President. WD-P.

P. S.—Upon receipt of signed copies we shall execute and return your copy.

13

EXHIBIT "E."

Chicago. Cleveland. Spokane, Wash.

Bates & Rogers Construction Co.,

Civil Engineers and Contractors.

New Cumberland, Pa., June 17, 1918.

Terwilliger Equipment Co., Philadelphia, Pa.

GENTLEMEN: Enclosed please find your copy of contract covering rental of Steam Shovel, duly signed by ourselves. Yours truly, Bates & Rogers Construction Co. E. P. Lenahan, Vice-President. DBC:F.

EXHIBIT "F."

Contract Between L. Klebe & Company and Bates & Rogers Construction Co.

Equipment.

This agreement, made this 18th day of May, A. D. 1918, by and between L. Klebe & Company, of Philadelphia, Pa., hereinafter sometimes designated "Lessor," party of the first part, and Bates & Rogers Construction Co., a corporation under the laws of Illinois, hereinafter sometimes designated "Lessee" party of the second part, Witnesseth: Whereas the Lessee has, under date of April 26,

1918, entered into a contract with the United States Government for the construction of an interior storage depot at New Cumberland, Pa., with the terms and contents of which contract the Lessor is fully acquainted, and

Whereas, the Lessee, in the performance of said Government contract, will be required to make certain excavations on the grounds of said Interior Storage Depot.

Whereas, the Lessor is the owner of a steam shovel such equipment consisting substantially of the following:

1 Erie Traction Steam Shovel, Shop #74 Complete, the location and availability for immediate use of said steam shovel being as follows, viz: Philadelphia, Pa.,

Whereas, the Lessee desires to obtain the use of said steam shovel, therefore, in consideration of the mutual undertaking hereto, it is mutually agreed between the parties hereto as follows:

Section 1. The Lessor agrees that he will furnish and lease, and he does hereby lease to the lessee for its use in the performance of the said Government contract, said steam shovel as the Lessee shall require, that said steam shovel shall be an absolutely complete unit in itself, and in first-class repair and working order, fully ready for use when delivered.

Section 2. It is understood and agreed that such steam shovel — in a good state of repair; and if such equipment arrives at said Depot in bad order, or if, upon examination, the Lessee, or the Government's Constructing Quartermaster, sees fit to reject said equipment, for any cause whatever, they shall have the right to do so; and no rental for the said equipment so rejected shall be payable from the date of written notification to the Lessor by the Lessee of such rejection, provided that the Lessee load up the rejected equipment with reasonable promptness for return to the Lessor.

Section 3. The cost of loading and unloading said steam shovel and the transportation of the same from the place where now located to said Depot, the installation at said Depot, the dismantling of the said equipment, and the return transportation to original shipping point or an equivalent distance, as well as cost of all ordinary repairs and replacements during the use of the said equipment upon the work of the Lessee, shall be paid by the Lessee.

Section 4. While the operation of the said steam shovel is to be solely in the hands of the Lessee, the Lessor agrees to furnish, at the request and the call of the Lessee, operators necessary to the operation of said equipment on the work of the Lessee; all of the employes so furnished by the Lessor to be carried on the rolls of the Lessee and to be paid by the Lessee, and said Lessee is to furnish all fuels, oils, waste and supplies etc., necessary to the operation of said equipment. The Lessor will, therefore, not be interested in the rates and wages which the Lessee pays said employes, except that it is understood that the Lessee will pay the going rates to all such employes.

Section 5. The Lessee agrees that it will pay, and the Lessor agrees to receive, as and for the Lessor's compensation for the use of said steam shovel by the Lessee and the Lessor's services here-

under, a rental of Twenty-five dollars ($25.00) per diem for
16 such equipment after the same has been shipped (as evidenced by bill of lading) until the Lessee is through with the same and it has been loaded for return shipment as evidenced by bill of lading.

(2) That while the Lessee is to pay the cost of all ordinary repairs necessary while the said Steam Shovel is in operation and necessary to the return of the said equipment in as good condition as when received by the Lessee, ordinary wear and tear and loss by fire or inevitable accident excepted, the Lessee, paying the per diem rental above provided for, the Lessee shall be, and be taken to be, entitled to have from the Lessor, in such case, a complete Erie Traction Steam Shovel, similar in all respects to the one known and described as Shop No. 74 in first-class condition and repair and ready for successful operation.

Section 6. Notwithstanding anything herein contained, it is expressly agreed, that the Lessee may at any time, according as it may seem fit, release and return the said — covered by this instrument of lease, and that the rental hereunder for the said equipment shall cease immediately upon the delivery to the Lessor by the Lessee of written notice of the release, provided, however, that in such
17 case of Lessee shall, with all reasonable promptness, ship back to the Lessor at the destination herein before agreed upon the equipment so released.

Section 7. It is agreed that the Lessor will take out and maintain for himself upon the property hereby leased such insurance as he may desire, and that the Lessee shall not be responsible for injury to said property arising from ordinary wear and tear, or from fire, inevitable accident or any cause not within the control of the Lessee.

Section 8. The Lessor has made himself acquainted with the provisions of Article II of said Contract of —— —, 1918, between the party of the second part hereto and the United States Government and expressly agrees that all of the provisions of paragraph (c) of said Article II, shall apply to and be enforceable against the said equipment furnished and leased hereunder, to the end that the United States Government may have and exercise as to and against the said equipment all rights provided for in said paragraph (c), with respect to plant or parts thereof owned and furnished by the party of the second part hereto, the Lessor to be entitled, as owner, to receive any purchase price payments which upon any appropriation of said equipment by the United States Government, under said Article II, may be coming from said Government.

Section 9. The Lessor does hereby certify and declare the value of the said Erie Traction Steam Shovel, Shop No. 74, to be Five Thousand Dollars.

Section 10. This lease and contract may be assigned by and on the part of said Bates & Rogers Construction Co. to the United States.

In witness whereof, the parties hereto have hereunto set
18 their names and seals the day and year first above written.

Klebe & Co., By J. Klebe. Witness: F. Van Sciver. Bates & Rogers Construction Co., by E. P. Lenahan, Vice-President. Witness: ——

Article II.

Section (*c*).

"(*c*) Rental actually paid by the Contractor, at rates not to exceed those mentioned in the schedule of rental rates, hereto attached, for construction plant in sound and workable condition, such as pumps, derricks, concrete mixers, boilers, clam-shell or other buckets, electric motors, electric drills, electric hammers, electric hoists, steam shovels, locomotive cranes, power saws, engineers' levels and transits, and such other equipment as may be necessary for the proper and economical prosecution of the work.

"Rental to the Contractor for such construction plant or parts thereof as it may own and furnish at the rates mentioned in the schedule of rental rates hereto attached, except as hereinafter set forth. When such construction plant or any part thereof shall arrive at the site of the work, the Contractor shall file with the Contracting Officer a schedule setting forth the fair valuation at that time of each part of such construction plant. Such valuation shall be deemed final unless the Contracting Officer shall, within 19 five days after the machinery has been set up and is working, modify or change such valuation, in which event, the valuation so made by the Contracting Officer shall be deemed final. When and if the total rental paid to the Contractor for any such part shall equal the valuation thereof, no further rental therefor shall be paid to the Contractor and title thereto shall vest in the United States. At the completion of the work, the Constructing Officer may at his option purchase for the United States, any part of such construction plant then owned by the Contractor by paying to the Contractor the difference between the valuation of such part or parts and the total rentals theretofore paid therefor.

"Rates of rental as substitutes for such scheduled rental rates may be agreed upon in writing between the Contractor and the Contracting Officer, such rates to be in conformity with rates of rental charged in the particular territory in which the work covered by this contract is to be performed. If the Contracting Officer shall furnish or supply any such equipment, the Contractor shall not be allowed any rental therefor and shall receive no fee for the use of such equipment."

IV. HISTORY OF FURTHER PROCEEDINGS.

On January 10, 1921, the case was submitted by Mr. W. D. Harris, for defendant, on the Court's order of remand, on defendant's demurrer to the plaintiffs' petition as amended.

V. ORDER OF COURT.

Entered January 31, 1921.

This case came on to be heard upon the defendant's demurrer to the plaintiffs' petition as amended. On consideration whereof the court, being of opinion that it should be more fully advised as to the facts in the case, doth adjudge and order that the said demurrer to the petition as amended be and the same is overruled without prejudice to a renewal of any of the questions that may be be presented in the case. By the Court.

VI. ARGUMENT AND SUBMISSION OF CASE.

On December 14, 1921, the case was argued and submitted on merits by Mr. Daniel C. Donoghue, for plaintiffs, and Mr. George H. Foster, for defendant.

21 ## VII. FINDINGS OF FACT, CONCLUSION OF LAW, OPINION OF THE COURT BY CAMPBELL, CH. J., AND DISSENTING OPINION BY GRAHAM, J.

Entered March 20, 1922.

This case having been heard by the Court of Claims, the court, upon consideration of the agreed statement of facts stipulated and signed on behalf of the plaintiffs by Daniel C. Donoghue, their attorney, and on behalf of the defendant by Annette Abbott Adams, Assistant Attorney General of the United States, makes the following

Finding of Fact.

I.

Plaintiffs, Louis Klebe and Jules Klebe, are copartners, trading as L. Klebe & Company, citizens of the United States, and residents of and doing business in the City of Philadelphia, State of Pennsylvania.

II.

Plaintiffs have always borne true faith and allegiance to the United States, having always and at all times been loyal citizens thereof and have never been guilty of any act or acts of disloyalty to or toward the Government of the United States.

III.

Plaintiffs are the sole owners of the claim herein presented and sued upon, no part thereof having at any time been assigned or transfrred.

IV.

Between April 6, 1917, and November 11, 1918, the United States was engaged in a great war with the German Empire in Europe, on the high seas and in other parts of the world.

V.

At, and prior to May 12, 1918, Bates & Rogers Construction Company were erecting for the United States an inland storage
22 depot at New Cumberland, Pennsylvania, for use in the prosecution of the then pending war, and in constructing said depot steam shovels were used. Said work was being performed under a contract between the Bates & Rogers Construction Company and the United States, a copy of which, marked Exhibit G, is attached hereto and made a part of these findings.

VI.

Plaintiffs were the owners of an Erie traction steam shovel B-74 which Bates & Rogers Construction Company were desirous of leasing for use in erecting the above inland storage depot. Bates & Rogers Construction Company leased the shovel from plaintiffs for $25 per day, and plaintiffs delivered said shovel to Bates & Rogers Construction Company on May 18, 1918, upon which date the rental commenced. In June, 1918, the plaintiffs and Bates & Rogers Construction Company executed the written lease, dated May 18, 1918, which is set forth as "Exhibit F" in the plaintiffs' petition. The correspondence and facts preceding the execution of that lease is set forth as follows:

Plaintiffs were the owners of one Erie traction steam shovel No. 74 and Bates & Rogers Construction Company was desirous of leasing the said shovel for use in connection with the erection of the above inland storage depot at New Cumberland, Pa. Plaintiffs were represented by the Terwilliger Equipment Company, who were brokers, and whose business it was to negotiate leases on construction machinery. After verbal conferences between representatives of the Bates and Rogers Construction Company and the Terwilliger Equipment Company, the latter company wrote to the former as follows:

May 15, 1918.

Messrs. Bates & Rogers, New Cumberland, Pa.

Attention Mr. Whitney.

GENTLEMEN: Confirming conversation with you of even date over the telephone, wish to say it is our understanding that we are to ship to Major W. Morava, construction quartermaster for Bates & Rogers, New Cumberland, Pennsylvania, Pennsylvania Railroad delivery, one Thew and one Erie revolving shovel as inspected and accepted by your Mr. Oscar Sackerson to-day, rental prices on the Thew to

be $24.50 per calendar day, and $25.00 per calendar day on the Erie, with the understanding you pay loading charges upon their return and freight to and from their present location, rental period to start on date of bill of lading showing shipment and cease on date of bill of lading showing return. Also we are to furnish you a competent steam-shovel operator, who is to ride these shovels through to New Cumberland, Pennsylvania, and that their time is to be charged with the loading charges up until they reach New Cumberland, Pennsylvania, at which time they will report to you and be put on your pay roll.

We are having cars placed for these two shovels and expect to have the Thew loaded by to-morrow night and the Erie not later than Friday.

23 We wish to assure you that we are doing everything possible to help your Mr. Sackerson. We have also wired Thew Shovel people to express two center sections of grates which are in need of replacement. We will have formal leases made up and mailed you within the next day or so covering these shovels.

We can get you one and probably two more shovels if you need them, one a A-1 Thew, the other an Erie, which we trust will be interesting to you in the event of your wanting more shovels. Price would be $25.00 per day on the two mentioned above. Yours, very truly, Terwilliger Equipment Company. H. E. G.—M. M. F.

Plaintiffs made delivery of said shovel on May 18, 1918.

On May 21, 1918, plaintiffs forwarded a form of lease signed by them to the Bates & Rogers Construction Company. A copy of said lease is attached to the petition, marked "Exhibit A," and a copy of the letter transmitting the same is attached to the petition and marked "Exhibit B." Both exhibits are made a part hereof by reference. Said lease was not signed by the Bates & Rogers Construction Company. On June 3, 1918, the Bates & Rogers Construction Company forwarded a lease to plaintiffs. A copy of the letter transmitting the same is attached to the petition, marked "Exhibit C," and is made a part hereof by reference. The contract of lease sent by the Bates & Rogers Construction Company for the signature of Klebe & Company is attached to the petition, marked "Exhibit F," was duly executed and signed by plaintiffs and returned to the Bates & Rogers Construction Company, which contract was in turn executed and signed by the Bates & Rogers Construction Company and returned to plaintiffs on June 17, 1918. A copy of the letter returning the said duly signed contract is attached to the petition as "Exhibit E," and is made a part hereof by reference. At the time the said contract was submitted by the Bates & Rogers Construction Company to plaintiffs a copy of sec. C, Article 2, of the contract between the United States and the Bates & Rogers Construction Company for the erection of the Interior Storage Depot, New Cumberland, Pennsylvania, was physically annexed to said "Exhibit F." One of the original executed copies is attached hereto

VII.

The sum of $4,225 was paid to plaintiffs by Bates & Rogers Construction Company in the amounts, at the times, and for rental for said shovel for the periods stated, as follows:

Payments by Bates & Rogers Construction Company to Claimants.

Amount.	Date of payment.	Period covered.
$1,100.00	July 15th	44 days 5/18 to 6/30.
775.00	Aug. 19th	31 " 7/1 " 7/31.
1,050.00	Sept. 18th	42 " 8/1 " 1/11.
525.00	Oct. 9th	21 " 9/12 " 10/2.
700.00	Nov. 7th	28 " 10/3 " 10/30.
75.00	Dec. 6th	3 " 10/31 " 11/2.

24 Payments made by the United States to the Bates & Rogers Construction Company are as follows:

Amount.	Date of payment.
$350.00	July 6th.
750.00	6th.
175.00	Aug. 12th.
775.00	14th.
175.00	15th.
175.00	22nd.
175.00	30th.
175.00	Sept. 7th.
175.00	13th.
175.00	19th.
175.00	25th.
175.00	Oct. 2nd.
175.00	9th.
175.00	16th.
175.00	23rd.
175.00	30th.
75.00	Nov. 6th.

VIII.

The said steam shovel of the plaintiffs was appropriated by the Government as its property under the purchase privilege clause of the contract between the plaintiffs and the Bates & Rogers Construction Company and the facts pertaining to said appropriation are as follows: Major W. Morava was the constructing officer under the contract between the Bates & Rogers Construction Company and the United States and Major Henry McConnell, Quartermaster Corps, was duly authorized to act in his place and stead by the War Department. On October 2, 1918, the Bates & Rogers Construction Company sent the following letter to the constructing quartermaster

at New Cumberland, Pennsylvania, which officer by the first endorsement attached to said letter forwarded the same to the War Department, which is also shown as follows:

October 2, 1918.

Major W. Morava, Constructing Q. M., Army Reserve Depot, New Cumberland, Pa.

DEAR SIR: You will please be advised that we anticipate being finished using Erie shovel B-74 in about fifteen days.

This shovel, which is valued at $5,000.00, and is the property of L. Klebe & Co., Philadelphia, Pa., will have earned approximately $3,825.00 at that time.

Kindly indicate to us whether it is the intention of the Government to exercise its purchase privilege. Yours, truly, Bates & Rogers Construction Company. W. D.—P.

25 1st Ind.

Constructing Quartermaster, New Cumberland, Pa., Oct. 9, 1918, to Chief of Construction Division, Washington, D. C.:

1. Forwarded for action. It is recommended that this shovel be taken over by the Government if there is Government work to which it can be assigned. Henry McConnell, Major, Quartermaster Corps, Acting Constructing Quartermaster.

The recommendation of the constructing quartermaster contained in the foregoing first indorsement was approved on October 14, 1918, by the Chief of the Construction Division of the War Department, Washington, D. C. On October 17, 1918, the constructing quartermaster notified the Bates & Rogers Construction Company as follows:

October 17, 1918.

Memorandum to Bates & Rogers Construction Co.

Referring to your letter dated October 2, 1918, asking whether or not the Government intends to exercise its purchase privilege on Erie shovel B-74, valued at $5,000,00, on which approximately $3,825.00 rental has accrued, you are advised that, acting upon instructions from Washington, we hereby exercise the Government's purchase privilege and take over said Erie steam shovel B-74 as the property of the United States.

We are further directed to ship this shovel as soon as we are through with it here to the officer in charge of construction, Mays Landing, N. J., to whom you will invoice the shovel, charging the difference between the agreed valuation and the accrued rental at the date of transfer. This invoice should be certified by this office before being forwarded and a copy should be furnished us to be sent to Washington. Henry McConnell, Major, Quartermaster Corps, Acting Constructing Quartermaster. HMCC/W.

On October 28, 1918, the Bates & Rogers Construction Company sent the following letter to plaintiffs:

October 28, 1918.

Messrs. L. Klebe & Co., 1109 West Dauphin St., Philadelphia, Pa.

GENTLEMEN: You will please be advised that the War Department had notified us that it intends to exercise its purchase privilege under section eight of the rental contract under which we are using your Erie shovel and to take the same over as Government property the 31st instant.

Kindly send bill at agreed valuation, less earned rentals at once. Yours, truly, Bates & Rogers Construction Co. WD-MR.

26 On November 4, 1918, the Bates & Rogers Construction Company wrote plaintiffs as follows:

November 4, 1918.

GENTLEMEN: With further reference to the taking over by the War Department of your Erie shovel B-74, at the agreed valuation less rentals accrued up to the time when we are finished with it on this work, will ask that you render us invoice in septuple for this shovel at the valuation contained in our contract, less rentals earned up to and including November 2nd, which totals $4,225.00.

Trusting that you will give this matter your earliest attention, we are, Yours, truly, Bates & Rogers Construction Co. HMcC-W.

On November 5, 1918, plaintiffs replied to the Bates & Rogers Construction Company as follows:

GENTLEMEN: We have consulted our counsel relative to the right of the Government to appropriate our shovel upon payment of an agreed valuation less earned rentals and your request for a bill for the shovel under these terms.

We are advised that our contract with you was not made subject to the terms of any contract you had with the Government, that clause of the contract having been left blank, and that if the Government wants our property it should pay its fair valuation at the time of the appropriation, due notice of which should be given to us by the Government.

Under the circumstances we shall look to you for the payment of the rental and the return of the shovel as provided for in the contract. Very truly, yours, (Sgd.) Klebe & Company.

On November 6, 1918, the constructing quartermaster wrote to Klebe & Company as follows:

1. The contractors here, Bates & Rogers Construction Co., have shown me your letter of November 5th, in which you state that acting upon advice of your counsel, you declined to turn over to the Government shovel No. 74, believing that your contract does not cover the taking over of the shovel.

2. This is to advise you that the Government has taken over your

shovel No. 74 as distinctly provided in the contract. Any claims you have to the contrary should be taken up with the Chief of Construction Division, Washington, D. C. So far as this office is concerned the matter is closed. Henry McConnell, Major, Quartermaster Corps, Acting Constructing Quartermaster. HMcC-W.

27 On November 6, 1918, Bates & Rogers Construction Company wrote to Klebe & Company as follows:

GENTLEMEN: Your letter of the 5th instant, with reference to Government taking over the steam shovel, as per the terms of an agreement entered into with you for the same, has been received by us and referred to the constructing quartermaster at this point.

He advises us that he has communicated with you to-day and also advises that the contract as made is regular in every respect and that the Government has taken over the shovel as its property.

If you will furnish us with an invoice for amount less rentals paid you we will transmit the same to them for early remittance. Yours, truly, Bates & Rogers Construction Company. DBC-R.

On November 21, 1918, the Bates & Rogers Construction Company wrote to plaintiffs as follows:

GENTLEMEN: Please refer to our considerable correspondence with reference to your steam shovel taken over by the Government.

This work here will be finished by December 1st and by that time our accounts will be closed and our organization taken away. There is a balance due you on your shovel and if you wish us to handle this matter with the Government for you it will be necessary that you furnish us your invoice, but if you wish to handle it direct with the Government kindly advise us. Yours, very truly, Bates & Rogers Construction Co. DBC-R.

On December 9, 1919, Bates & Rogers Construction Company wrote the constructing quartermaster at New Cumberland, Pennsylvania, as follows:

DEAR SIR: Attached please find our complete file, with reference to the Government taking over Erie steam shovel "B" 74, the property of L. Klebe & Company, Philadelphia, which was on this work under the usual contract and on which your office instructed us to ship to Mays Landing, New Jersey.

You will note that Klebe & Company are objecting to the Government taking over this shovel, claiming that under the terms of the contract they have no right to do so.

You will also note a letter addressed to that company by Major McConnell, in which is clearly defined the position of the Government.

We have on several occasions asked Klebe & Company to furnish us with their invoice so that same could be transmitted to you for payment. Up to the present time they have not furnished this invoice and it appears that they do not intend doing so.

This is referred to you for direct handling with Klebe & Company and we wish to advise that our Company will not assume any responsibility or liability and that we have closed our records. Yours, truly, Bates & Rogers Construction Co. (Sgd.) D. B. Cassell.

28 IX.

The work of constructing the Interior Storage Depot at New Cumberland, Pennsylvania, was completed early in December, 1918. The class of work on which steam shovels were used was completed subsequent to November 6, 1918. The exact date can not be ascertained. On November 6, 1918, about 95 per cent of the excavating work had been done. All such work had been done for the warehouses, but some cuts for roads and switches remained to be completed, and the proper Government officials caused the release of several shovels and took over only such equipment as would relieve the Government from payment of further rentals. This steam shovel was shipped from this work at New Cumberland on November 2, 1918, to Mays Landing, New Jersey, to be used on other Government work.

X.

At the time the United States took over the said shovel its fair value was $5,000.

XI.

The United States has been ready and willing at all times to pay plaintiffs the sum of $775 pursuant to the rights which it asserts under the contract between plaintiffs and Bates & Rogers Construction Company, being "Exhibit F" of the plaintiffs' petition.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law, that the plaintiffs are entitled to recover $775. It is therefore adjudged and ordered by the court that the plaintiffs recover of and from the United States the sum of seven hundred and seventy-five dollars ($775).

29 **EXHIBIT "G" REFERRED TO IN COURT'S FINDING V.**

EXHIBIT G TO FINDINGS.

Contract for Emergency Work.—Construction of New Cumberland (Pa.) Quartermaster Interior Storage Depot.

Contract made and concluded this 26th day of April, 1918, by and between Bates & Rogers Construction Company, of Chicago, Illinois, a corporation organized under the laws of the State of Illinois, repre-

sented by W. A. Rogers, its president, party of the first part (hereinafter called Contractor) and the United States of America by Colonel R. C. Marshall, Jr., Q. M. Corps, N. A. (hereinafter called Contracting Officer) acting by authority of the Secretary of War, party of the second part.

Whereas the Congress having declared by joint resolution approved April 6, 1917, that war exists between the United States of America and Germany, a national emergency exists and the United States urgently requires the immediate performance of the work hereinafter described, and it is necessary that said work shall be completed within the shortest possible time; and

Whereas it is advisable, under the disturbed conditions which exist in the contracting industry throughout the country, for the United States to depart from the usual procedure in the matter of letting contracts and adopt means that will insure the most expeditious results; and

Whereas the Contractor has had experience in the execution of similar work, has an organization suitable for the performance of such work, and is ready to undertake the same upon the terms and conditions herein provided:

Now, therefore, this contract witnesseth, That in consideration of the premises and of the payments to be made as hereinafter provided, the Contractor hereby covenants and agrees to and with the Contracting Officer as follows:

Article I.

Extent of the Work.—The Contractor shall, in the shortest possible time, furnish the labor, material, tools, machinery, equipment, facilities, and supplies, and do all things necessary for the construction and completion of the following work:

Sewers, excavation, grading, paving, railroad tracks, and all subsurface work, and such work as it may be directed in writing by the Contracting Officer to do, in connection with construction of quartermaster warehouses, at New Cumberland, near Harrisburg, Pennsylvania, in accordance with the drawings and specifications to be furnished by the Contracting Officer, and subject in every detail to his supervision, direction, and instruction.

The Contracting Officer may, from time to time, by written instructions or drawings issued to the Contractor, make changes in said drawings and specifications, issue additional instructions, require additional work, or direct the omission of work previously ordered, and the provisions of this contract shall apply to all such changes, modifications, and additions with the same effect as if they were embodied in the original drawings and specifications. The Contractor shall comply with all such written instructions or drawings.

The title to all work completed or in course of construction shall be in the United States; and upon delivery at the site of the work, and upon inspection and acceptance in writing by the Contracting Officer, all machinery, equipment, hand tools, supplies, and materials, for which the Contractor shall be entitled to be reimbursed under

paragraph (*a*) of Article II hereof, shall become the property of the United States. These provisions as to title shall not operate to relieve the Contractor from any duties imposed hereby or by the Contracting Officer.

Article II.

Cost of the Work.—The Contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the Contracting Officer and as are included in the following items:

(*a*) All labor, material, machinery, hand tools not owned by the workmen, supplies and equipment, necessary for either temporary or permanent use for the benefit of said work; but this shall not be construed to cover machinery or equipment mentioned in section (*c*) of this article. The Contractor shall make no departure from the standard rate of wages being paid in the locality where said work is being done without the prior consent and approval of the Contracting Officer.

(*b*) All subcontracts made in accordance with the provisions of this agreement.

(*c*) Rental actually paid by the Contractor, at rates not to exceed those mentioned in the schedule of rental rates hereto attached, for construction plant in sound and workable condition, such as pumps, derricks, concrete mixers, boilers, clamshell or other buckets,
31 electric motors, electric drills, electric hammers, electric hoists, steam shovels, locomotive cranes, power saws, engineers' levels and transits, and such other equipment as may be necessary for the proper and economical prosecution of the work.

Rental to the Contractor for such construction plant or parts thereof as it may own and furnish, at the rates mentioned in the schedule of rental rates hereto attached, except as hereinafter set forth. When such construction plant or any part thereof shall arrive at the site of the work, the Contractor shall file with the Contracting Officer a schedule setting forth the fair valuation at that time of each part of such construction plant. Such valuation shall be deemed final, unless the Contracting Officer shall, within five days after the machinery has been set up and is working, modify or change such valuation, in which event the valuation so made by the Contracting Officer shall be deemed final. When and if the total rental paid to the Contractor for any such shall equal the valuation thereof, no further rental therefor shall be paid to the Contractor, and title thereto shall vest in the United States. At the completion of the work, the Constructing Officer may at his option purchase for the United States any part of such construction plant then owned by the Contractor by paying to the Contractor the difference between the valuation of such part or parts and the total rentals theretofore paid therefor.

Rates of rental as substitutes for such scheduled rental rates may be agreed upon in writing between the Contractor and the Contracting Officer, such rates to be in conformity with rates of rental

charged in the particular territory in which the work covered by this contract is to be performed. If the Contracting Officer shall furnish or supply any such equipment, the Contractor shall not be allowed any rental therefor and shall receive no fee for the use of such equipment.

(*d*) Loading and unloading such construction plant, the transportation thereof to and from the place or places where it is to be used in connection with said work, subject to the provisions hereinafter set forth, the installation and dismantling thereof, and ordinary repairs and replacements during its use in the said work.

(*e*) Transportation and expenses to and from the work of the necessary field forces for the economical and successful prosecution of the work, procuring labor and expediting the production and transportation of material and equipment.

(*f*) Salaries of resident engineers, superintendents, timekeepers, foremen, and other employees at the field offices of the Contractor in connection with said work. In case the full time of any field employee of the Contractor is not applied to said work but is divided between said work and other work, his salary shall be included in this item only in proportion to the actual time applied to this work.

(*g*) Buildings and equipment required for necessary field offices, commissary, and hospital and the cost of maintaining and operating said offices, commissary, and hospital, including such minor expenses as telegrams, telephone service, expressage, postage, etc.

(*h*) Such bonds, fire, public liability, employers' liability, workmen's compensation and other insurance as the Contracting
32 Officer may approve or require and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the Contracting Officer to have been actually sustained (including settlements made with the written consent and approval of the Contracting Officer) by the Contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor. Such losses and expenses shall not be included in the cost of the work for the purpose of determining the Contractor's fee. The cost of reconstructing and replacing any of the work destroyed or damaged shall be included in the cost of the work for the purpose of reimbursement to the Contractor, but not for the purpose of determining the Contractor's fee, except as hereinafter provided.

(*i*) Permit fees, deposits, royalties, and other similar items of expense incidental to the execution of this contract, and necessarily incurred. Expenditures under this item must be approved in advance by the Contracting Officer.

(*j*) Such proportion of the transportation, traveling, and hotel expenses of officers, engineers, and other employees of the Contractor as is actually incurred in connection with this work.

(*k*) Such other items as should in the opinion of the Contracting Officer be included in the cost of the work. When such an item is allowed by the Contracting Officer, it shall be specifically certified as being allowed under this paragraph.

The United States reserves the right to pay directly to common carriers any or all freight charges on material of all kinds, and machinery, furnished under this contract, and certified by the Contracting Officer as being for installation or for consumption in the course of the work hereunder; the Contractor shall be reimbursed for such freight charges of this character as it shall pay and as shall be specifically certified by the Contracting Officer; but the Contractor shall have no fee based on such expenditures. Freight charges paid by the Contractor for transportation of construction equipment, construction plant, tools, and supplies of every character shall be treated as part of the cost of the work upon which the Contractor's fee shall be based; provided that charges for transportation of such construction equipment, construction plant and tools over distances in excess of five hundred miles shall require the special approval of the Contracting Officer.

No salaries of the Contractor's executive officers, no part of the expense incurred in conducting the Contractor's main office, or regularly established branch office, and no overhead expenses of any kind, except as specifically listed above, shall be included in the cost of the work; nor shall any interest on capital employed or on borrowed money be included in the cost of the work.

The Contractor shall take advantage to the extent of its ability of all discounts available, and when unable to take such advantage shall promptly notify the Contracting Officer of its inability and its reasons therefor.

All revenue from the operations of the commissary, hospital, or other facilties, or from rebates, refunds, etc., shall be accounted for by the Contractor and applied in reduction of the cost of the work.

33 Article III.

Determination of Fee.—As full compensation for the services of the Contractor, including profit and all general overhead expense, except as herein specifically provided, the Contracting Officer shall pay to the Contractor in the manner hereinafter prescribed a fee to be determined at the time of completion of the work from the following schedule, except as hereinafter otherwise provided:

If the cost of the work is $100,000 or under, a fee of 7% of such cost.

If the cost of the work is over $100,000 and under $125,000, a fee of $7,000.

If the cost of the work is over $125,000 and under $450,000, a fee of 6½%.

If the cost of the work is over $450,000 and under $500,000, a fee of $29,250.

If the cost of the work is over $500,000 and under $1,000,000, a fee of 6%.

If the cost of the work is over $1,000,000 and under $1,100,000, a fee of $60,000.

If the cost of the work is over $1,100,000 and under $1,500,000, a fee of 5½%.

If the cost of the work is over $1,500,000 and under $1,650,000, a fee of $82,500.

If the cost of the work is over $1,650,000 and under $2,200,000, a fee of 5%.

If the cost of the work is over $2,200,000 and under $2,450,000, a fee of $110,000.

If the cost of the work is over $2,450,000 and under $2,850,000, a fee of 4½%.

If the cost of the work is over $2,850,000 and under $3,250,000, a fee of $128,250.

If the cost of the work is over $3,250,000 and under $4,000,000, a fee of 4%.

If the cost of the work is over $4,000,000 and under $4,250,000, a fee of $160,000.

If the cost of the work is over $4,250,000 and under $4,775,000, a fee of 3¾%.

If the cost of the work is over $4,775,000 and under $5,175,000, a fee of $179,062.50.

If the cost of the work is over $5,175,000 and under $5,725,000, a fee of 3½%.

If the cost of the work is over $5,725,000 and under $6,225,000, a fee of $200,375.

If the cost of the work is over $6,225,000 and under $6,825,000, a fee of 3¼%.

If the cost of the work is over $6,825,000 and under $7,400,000, a fee of $221,812.50.

If the cost of the work is over $7,400,000 and under $7,750,000, a fee of 3%.

If the cost of the work is over $7,750,000 and under $8,350,000, a fee of $235,500.

If the cost of the work is over $8,350,000 and under $8,800,000, a fee of 2¾%.

34 If the cost of the work is over $8,800,000 and under $9,650,000, a fee of $242,000.

If the cost of the work is over $9,650,000 and under $10,000,000, a fee of 2½%.

If the cost of the work is over $10,000,000, a fee of $250,000.

Provided, however, that the fee upon such part of the cost of the work as is represented by payments to subcontractors, under subdivision (*b*) of Article II hereof, shall in each of the above contingencies be two and one-half per cent (2½%) and no more of the amount of such part of the cost.

The cost of materials purchased or furnished by the Contracting Officer for said work, exclusive of all freight charges thereon, shall be included in the cost of the work for the purpose of reckoning such fee to the Contractor, but for no other purpose.

The fee for reconstructing and replacing any of the work destroyed or damaged shall be such per centage of the cost thereof—not exceeding seven per cent (7%)—as the Contracting Officer may determine.

The total fee to the Contractor hereunder shall in no event exceed the sum of $100,000.00, anything in this agreement to the contrary notwithstanding.

Article IV.

Payments.—On or about the seventh day of each month the Contracting Officer and the Contractor shall prepare a statement showing as completely as possible: (1) the cost of the work up to and including the last day of the previous month, (2) the cost of the materials furnished by the Contracting Officer up to and including such last day, and (3) an amount equal to two and one-half per cent (2½%), except as herein otherwise provided, of the sum of (1) and (2) on account of the Contractor's fee; and the Contractor at such time shall deliver to the Contracting Officer original signed pay rolls for labor, original invoices for materials purchased, and all other original papers not theretofore delivered supporting expenditures claimed by the Contractor to be included in the cost of the work. If there be any item or items entering into such statement upon which the Contractor and the Contracting Officer can not agree, the decision of the Contracting Officer as to such disputed item or items shall govern. The Contracting Officer shall then pay to the Contractor on or about the ninth day of each month the cost of the work mentioned in (1) and the fee mentioned in (3) of such statement, less all previous payments. When the statement above mentioned includes any work of reconstructing and replacing work destroyed or damaged, the payment on account of the fee in (3) for such reconstruction and replacement work shall be computed at such rate, not exceeding two and one-half per cent (2½%), as the Contracting Officer may determine. The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof. The Contracting Officer may also make payments at more frequent intervals for the purpose of enabling the Contractor to take advantage of discounts at intervals between the dates above mentioned or for other lawful purposes. Upon final completion of said work the Contracting Officer shall pay to the
35 Contractor the unpaid balance of the cost of the work and of the fee as determined under Articles II and III hereof.

Article V.

Inspection and Audit.—The Contracting Officer shall at all times be afforded proper facilities for inspection of the work and shall at all times have access to the premises, to the work and material, and to all books, records, correspondence, instructions, plans, drawings, receipts, vouchers, and memoranda of every description of the Contractor pertaining to said work; and the Contractor shall preserve for a period of two years after its completion or cessation of work under this contract all the books, records, and other papers just mentioned. Any duly authorized representative of the Contractor shall be accorded the privilege of examining the books, rec-

ords, and papers of the Contracting Officer relating to said work for the purpose of checking up and verifying the cost of said work. The system of accounting to be employed by the Contractor shall be such as is satisfactory to the Contracting Officer.

If at any time the Contracting Officer shall find that bills for labor, material, or other bills legitimately incurred by the Contractor hereunder, are not promptly paid by the Contractor, the Contracting Officer may, in his discretion, refuse to make further payments to the Contractor until all such obligations past due shall have been paid. Should the Contractor neglect or refuse to pay such bills within five days after notice from the Contracting Officer so to do, then the Contracting Officer shall have the right to pay such bills directly, in which event such direct payments shall not be included in the cost of the work.

Article VI.

Special Requirements.—The Contractor hereby agrees that it will:

(*a*) Begin the work herein specified at the earliest time practicable, and diligently proceed so that such work may be completed at the earliest possible date.

(*b*) Promptly pay for all labor, material, or other service rendered.

(*c*) Procure and thereafter maintain such insurance in such forms and in such amounts and for such periods of time as the Contracting Officer may approve or require.

(*d*) Procure all necessary permits and licenses, and obey and abide by all laws, regulations, ordinances, and other rules applying to such work, of the United States of America, of the State or Territory wherein such work is done, of any subdivision thereof, or of any duly constituted public authority.

(*e*) Unless this provision is waived by the Contracting Officer, insert in every contract made by it for the furnishing to it of services, materials, supplies, machinery, and equipment, or the use thereof, for the purposes of the work hereunder, a provision that such contract is assignable to the United States; will make all such contracts in its own name, and will not bind or purport to bind the United States or the Contracting Officer thereunder.

(*f*) In every subcontract made in accordance with the provisions hereof require the subcontractor to agree to comply fully
36 with all the undertakings and obligations of the Contractor herein, excepting such as do not apply to such subcontractor's work.

(*g*) At all times keep at the site of the work a duly appointed representative who shall receive and execute on the part of the Contractor such notices, directions, and instructions as the Contracting Officer may desire to give.

(*h*) At all times use its best efforts in all its acts hereunder to protect and subserve the interest of the Contracting Officer and the United States.

Article VII.

Right to Terminate Contract.—Should the Contractor at any time refuse, neglect, or fail in any respect to prosecute the work with promptness and diligence, or default in the performance of any of the agreements herein contained, the Contracting Officer may, at his option, after five days' written notice to the Contractor, terminate this contract, and may enter upon the premises and take possession, for the purpose of completing said work, of all materials, tools, equipment, and appliances, and all options, privileges, and rights, and may complete or employ any other person or persons to complete said work. In case of such termination of the contract, the Contracting Officer shall pay to the Contractor such amounts of money on account of the unpaid balance of the cost of the work and of the fee as will result in fully reimbursing the Contractor for the cost of the work up to the time of such termination, plus a fee computed thereon at the rate or rates for monthly payments set forth in Article IV hereof; and the Contracting Officer shall also pay to the Contractor compensation, either by purchase or rental, at the election of the Contracting Officer, for any equipment retained; such compensation, in the event of rental, to be in accordance with paragraph (*c*) of Article II, and in the event of purchase to be based upon the valuation determined by the Contracting Officer as of the time of his taking such possession. The Contractor hereby agrees that such payments when made shall constitute full settlement of all claims of the Contractor against the Contracting Officer and the United States or either of them for money claimed to be due to the Contractor for any reason whatsoever. In case of such termination of the contract the Contracting Officer shall further assume and become liable for all such obligations, commitments, and unliquidated claims as the contractor may have theretofore in good faith undertaken or incurred in connection with said work, and the Contractor shall, as a condition of receiving the payments mentioned in this article, execute and deliver all such papers, and take all such steps as the Contracting Officer may require for the purpose of fully vesting in him the rights and benefits of the Contractor under such obligations or commitments. When the Contracting Officer shall have performed the duties incumbent upon him under the provisions of this article, the Contracting Officer shall thereafter be entirely released and discharged of and from any and all demands, actions, or claims of any kind on the part of the Contractor hereunder or on account hereof.

37 Article VIII.

Abandonment of Work by Contracting Officer.—If conditions should arise which in the opinion of the Contracting Officer make it advisable or necessary to cease work under this contract, the Contracting Officer may abandon the work and terminate this contract. In such case the Contracting Officer shall assume and become liable for all such obligations, commitments, and unliquidated claims as

the Contractor may have theretofore, in good faith, undertaken or incurred in connection with said work; and the Contractor shall, as a condition of receiving the payments mentioned in this article, execute and deliver all such papers, and take all such steps as the Contracting Officer may require for the purpose of fully vesting in him the rights and benefits of the Contractor under such obligations or commitments. The Contracting Officer shall pay to the Contractor such an amount of money on account of the unpaid balance of the cost of the work and of the fee as will result in the Contractor receiving full reimbursement for the cost of the work up to the time of such abandonment, plus a fee to be computed in the following manner: To the cost of the work up to the time of such abandonment shall be added the amount of the contractual obligations or commitments assumed by the Contracting Officer, and such total shall be treated as the cost of the work, upon which the fee shall be computed in accordance with the provisions of Article III hereof. When the Contracting Officer shall have performed the duties incumbent upon him under the provisions of this article, the Contracting Officer and the United States shall thereafter be entirely released and discharged of and from any and all demands, actions, or claims of any kind on the part of the Contractor hereunder or on account hereof.

Article IX.

Bond.—The Contractor shall prior to commencing the said work furnish a bond, with sureties satisfactory to the Contracting Officer, in the sum of fifty thousand ($50,000) dollars, conditioned upon its full and faithful performance of all the terms, conditions, and provisions of this contract and upon its prompt payment of all bills for labor, material, or other service furnished to the Contractor.

Article X.

Convict Labor.—No person or persons shall be employed in the performance of this contract who are undergoing sentence of imprisonment at hard labor imposed by the courts of any of the several States, Territories, or municipalities having criminal jurisdiction.

Article XI.

Hours and Conditions of Labor.—No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the Contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight (8) hours in any one calendar day upon such
38 work, such prohibition being in accordance with the Act approved June 19, 1912, limiting the hours of daily service of mechanics and laborers on work under contracts to which the United States is a party. For each violation of the requirements of this Article a penalty of Five Dollars ($5.00) shall be imposed upon the Contractor for each laborer or mechanic for every calendar day in

which said employee is required or permitted to labor more than eight (8) hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the United States; Provided, that this paragraph shall not be enforced nor shall any penalty be exacted in case such violation shall occur while there is in effect any valid Executive Order suspending the provision of said Act approved June 19, 1912, or waiving the provisions and stipulations thereof with respect to either this contract or any class of contracts in which this contract shall be included, or when the violation shall be due to any extraordinary events or conditions of manufacture, or to any emergency caused by fire, famine, or flood, by danger to life or property, or by other extraordinary events or conditions on account of which, by subsequent Executive Order, such past violation shall have been excused.

In the event of any dispute with reference to wages, hours, or other conditions appertaining to said work, between the Contractor or any subcontractor and labor employed by him on said work, the Contractor or subcontractor shall immediately notify the Contracting Officer of the existence of such dispute and the reasons therefor. The Contracting Officer may, at his option, instruct the Contractor or subcontractor involved in such dispute as to the method or steps which the Contractor or subcontractor should follow with reference thereto, and the Contractor or subcontractor shall thereupon comply with such instructions.

Article XII.

Right to Transfer or Sublet.—Neither this contract, nor any interest therein, shall be assigned or transferred. The Contractor shall not enter into any subcontract for any part of the work herein specified without the consent and approval in writing of the Contracting Officer. In case of such assignment, transfer, or subletting without the consent and approval, in writing, of the Contracting Officer, the Contracting Officer may refuse to carry out this contract either with the transferor or transferee, but all rights of action for any breach of this contract by the Contractor are reserved to the United States.

Article XIII.

No participation in Profits by Government Officials.—No member of or Delegate to Congress, or Resident Commissioner, nor any other person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, but this article shall not apply to this contract so far as it may be within the operation or exception of section 116 of the act of Congress approved March 4, 1909 (35 Stats., 1109).

39

Article XIV.

Settlement of Disputes.—This contract shall be interpreted as a whole, and the intent of the whole instrument, rather than the in-

terpretation of any special clause, shall govern. If any doubts or disputes shall arise as to the meaning or interpretation of anything in this contract, or if the Contractor shall consider itself prejudiced by any decision of the Contracting Officer made under the provisions of Article IV hereof, the matter shall be referred to the officer in charge of cantonment construction for determination. If, however, the Contractor shall feel aggrieved by the decision of the officer in charge of cantonment construction, it shall have the right to submit the same to the Secretary of War, whose decision shall be final and binding upon both parties hereto.

Article XV.

This contract shall bind and inure to the Contractor and its successors.

It is understood and agreed that wherever the words "Contracting Officer" are used herein, the same shall be construed to include his successor in office, any other person to whom the duties of the Contracting Officer may be assigned by the Secretary of War, and any duly appointed representative of the Contracting Officer.

Witness the hands of the parties hereto the day and year first above written, all in triplicate. Bates & Rogers Construction Company, by W. A. Rogers, President. Witnesses: (1) C. W. Burghart. (2) E. Stanley Holland. United States of America, by R. C. Marshall, Jr., Colonel, Q. M. Corps, N. A., Contracting Officer. Witnesses: (1) Evan Shelby. (2) H. L. Francisco.

A true copy of original contract. C. B. F. Brill, 1st Lieut., Q. M. C.

OPINION.

CAMPBELL, *Chief Justice,* delivered the opinion of the court:

The question for decision is whether from the facts there arises the implication of a contract, by which the Government agreed to pay $5,000, the value of the shovel, as for a taking of the property of plaintiffs for public use.

The law upon the subject is well settled. In a late case the Supreme Court of the United States, in an opinion by Mr. Justice McKenna, have said: "It is to be remembered that to bind the Government there must be implication of a contract to pay, but the circumstances may rebut that implication." John Horstmann Co. Case, decided November 21, 1921. And in the Tempel Case, 248 U. S., 121, 129, the court, speaking through Mr. Justice Brandeis, say: "If the plaintiff can recover, it must be upon an implied contract. For, under the Tucker Act, the consent of the United States to be sued is (so far as here material) limited to claims founded upon any contract, express or implied; and a remedy for claims sounding in tort is expressly denied." In Ball Engineering Co. v. White & Co., 250 U. S., 46, 57, it was held that the facts rebutted the implication of a contract that the

Government would pay, which, it is said in that case, must be the basis of its liability. What, then, are the facts? These have been stipulated by the parties, and from this stipulation it appears that the United States entered into what is called "a cost-plus" contract with the Bates & Rogers Construction Company (hereinafter called contractor) for work in connection with a storage depot. The Government's agent is called "the contracting officer."

The contractor undertook to furnish the labor, materials, equipment, etc., necessary for the completion of certain work involving sewers, excavation, grading, and subsurface work, according to plans and specifications, and he was to be paid for the cost of the work, as provided in Article II of the contract. Among other things, he was to be reimbursed for "rentals actually paid" by him for "steam shovels" at rates not to exceed those mentioned in the schedule of rates, as well as for similar equipment the contractor "may own and furnish," at the named schedule rental rates. Provision is made for the filing by the contractor with the contracting officer of a schedule setting forth the fair valuation of each part of the construction plant upon its arrival at the site, and this valuation was to be deemed final unless the contracting officer seasonably objected to the same. If the total rental paid to the contractor for any article should equal the valuation thereof, no further rental was payable and title would vest in the United States, and at the completion of the work the contracting officer could, at his option, purchase for the United States any part of the plant then owned by the contractor by paying the difference between its valuation and the rentals that had been paid thereon. In May, 1918, following this contract, the contractor, Bates & Rogers Construction Company, entered into a written agreement—called a lease—with Klebe & Company, the plaintiffs, for the use of a steam shovel at $25.00 per day. This lease contemplated the use of the shovel on the Government's work. It stated that the plaintiffs had acquainted themselves with the terms of the contract between the contractor and the United States, and contained a provision to the effect that all of the rights which the Government had under its contract as against property of the contractor should "apply to and be enforceable against" the property leased by plaintiffs, "to the end that the United States Government may have and exercise as to and against the said equipment all rights provided for in said paragraph c (of article II) with respect to" the contractor's property, the lessor (the plaintiffs), however, "to be entitled, as owners, to receive any purchase price payments, which upon any appropriation of said equipment by the United States Government under said Article II may be coming from said Government." The lease stated the valuation of the shovel at $5,000.

The stipulation says: "The said steam shovel of the claimants was appropriated by the Government as its property under the purchase privilege clause of the contract between the claimants and the Bates & Rogers Construction Company, and the facts pertaining to said appropriation as follows." Then follows certain correspondence, from which it appears that on October 2, when the work was

nearing completion, the contractor notified the contracting
41 officer of the fact, and, stating that at that time about $3,825 in rentals had been paid upon the shovel, inquired whether it was "the intention of the Government to exercise its purchase privilege." This notice was forwarded to Washington with his recommendation, and later, on October 17, the contracting officer replied to the inquiry of October 2, that "acting upon instructions from Washington, we hereby exercise the Government's purchase privilege and take over said Erie steam shovel B–74 as the property of the United States." The contractor notified the plaintiffs of this action, and on November 5, they replied to him that their contract did not provide that the Government could take the shovel at an agreed valuation, less rentals paid, and they would look to the contractor "for the payment of the rental and return of the shovel, as provided for in the contract." This letter of November 5 was brought to the contracting officer's attention, and he wrote to plaintiffs, stating: "This is to advise you that the Government has taken over your shovel No. 74, as distinctly provided in the contract." It should be observed that the facts clearly show that this officer's "instructions from Washington" were to exercise the Government's right to purchase the shovel, and that he neither had, nor attempted to exercise, any other right of appropriation by the Government. The record does not disclose that he had any authority to appropriate the shovel under the Government's power of eminent domain. At that time the paid rentals amounted to $4,225, and the difference between them and the valuation of the shovel, stated in the lease, is $775. The shovel was shipped to another place by the contractor under instructions from the contracting officer. The stipulation shows that the Government has been ready and willing at all times to pay this sum of $775, "pursuant to the rights which it asserts, under the contract." The plaintiffs are not suing for this balance, but claim $5,000 as the value of the shovel.

It is unquestionably settled that where the Government takes property for public use, conceding the ownership to be in an individual, it impliedly promises to make just compensation therefor. Great Falls Mfg. Co. Case, 112 U. S., 645; Bigby Case, 188 U. S., 400, 407; Ball Engineering Co. v. White & Co., 250 U. S., 46, 56; North American Co. Case, 253 U. S., 330, 333.

The basis for the enforcement of this liablity in the Court of Claims is that the taking, under the circumstances stated, raises an implied contract to pay for the property. Great Falls Mfg. Co. Case, 112 U. S., 645, 658, Tempel Case, supra; Peabody Case, 231 U. S., 530, 539. See also Russell Case, 182 U. S., 516, 530; Harley Case, 198 U. S., 229, 234; Court of Marion County, 53 C. Cls., 120, 149. As was held in United States v. North American Co., 253 U. S., 330, 335: "The right bring this suit against the United States in the Court of Claims i t founded upon the Fifth Amendment (Schillinger Case, 155 U ., 163, 168; Basso Case, 239 U. S., 602), but upon the existence of an implied contract entered into by the United States."

"It follows that where the circumstances in which the appropria-

tion occurs rebut the implication of a contract there can be no recovery. Ball Engineering Co. v. White & Co., 250 U. S., 46, 57, distinguishing Buffalo Pitts Co. Case, 234 U. S., 228; Tempel Case, supra; Natron Soda Co. Case, 54 C. Cls., 169, affirmed by the Supreme Court November 21, 1921.

42 Stating some of these rules, it was further said in United States v. North American Co., 253 U. S., 330, 333, that in order that the Government shall be liable, it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power.

We are required to observe the settled distinction between actions ex contractu and those ex delicto, because in the latter the Government has not subjected itself to suit. Langford Case, 101 U. S., 341, 345; Jones Case, 131 U. S., 1; Hill Case, 149 U. S., 593, 598; Bigby Case, 188 U. S., 400, 405.

The property was taken possession of because the Government officer asserted that an express contract gave it the right to purchase by paying the difference between what it had paid as rental, $4,225, and the stated valuation, $5,000. To claim that by the very act of exercising this asserted right to purchase for $775 the Government made itself liable, upon an implied contract, to pay $5,000, involves a contradiction of terms. It ignores any distinction between express and implied agreements, and confuses that class of contracts which grow out of the dealings of parties with the distinct class of implied contracts arising from the exercise of the sovereign right of eminent domain because of the Fifth Amendment. And this situation is not relieved by characterizing the contract right as an option, requiring actual payment, before the property could be taken in virtue of the contract. The appropriation was itself an exercise of this right of purchase, and the Government's agent so stated. The contract contemplated that the Government might elect to appropriate the property before making the payment. It provided that the plaintiffs were to be entitled, as owners, to receive any purchase price payments, "which upon appropriation of said equipment * * * may be coming from said Government." And it is not to be conceded that under a cost-plus contract, such as was made between the parties, the Government can not avail itself of the right of purchase stipulated for except upon paying in advance for the property involved. It, of course, becomes liable under the terms of purchase.

Under the facts it can not be asserted that the Government's claim was a mere subterfuge (and as to its interest and claim see Propeller Company Case, 14 Wall., 670, 675), but in determining the question here involved as to whether the property was taken under the implied contract, essential to plaintiff's case, we are not required to pass upon the validity of the Government's claim of right to the property in question, because, as was said in the Tempel case (p. 130): "It is unnecessary to determine whether this claim of the Government is well founded. The mere fact that the Government then claimed and now claims title in itself, and that it denies title in the plaintiffs,

prevents the court from assuming jurisdiction of the controversy." The Government's claim of a right of purchase, asserted and acted upon as it clearly was in this instance, negatives a conclusion that the property was taken under the power of eminent domain. "The law can not imply a promise by the Government to pay for a right over, or interest in, land, which right or interest the Government claimed and claims it possessed, before it utilized the same.
43 If the Government's claim is unfounded, a property right of plaintiff was violated; but the cause of action therefor, if any, is one sounding in tort, and for such the Tucker Act affords no remedy." Tempel case, supra. See Hill case, 149 U. S. 593, 598; Langford case, 101 U. S. 341.

The plaintiffs rely upon the Buffalo Pitts Co. case, 234 U. S. 228, but, plainly, the facts in that case are different from the facts in the instant case. The rule stated in Ball Engineering Co. v. White & Co., 250 U. S. 46, is applicable here. In the last-named case, Mr. Justice Day, who wrote the opinions in both cases, distinguishes the Buffalo Pitts Co. case, and from his analysis of the latter 250 U. S. 56) it appears that the Government recognized the claim of the Buffalo Pitts Company as mortgagor to the property in question, and represented that if the property were left in its possession and use, its attorney would recommend payment therefore, and, further, that the company relied on these representations and consented to the Government retaining possession of its property in expectation of receiving compensation therefor. In Ball Engineering Co. v. White & Co., it appeared that the Government had a contract with Hubbard and Company for the construction of a lock and dam, which provided for annulment under certain conditions, and by paragraph 33 provided that in case of annulment the Government would have the right to take the property on the premises at a valuation or rental to be fixed by the officer in charge. The contract was annulled and the work was relet to White & Company. The Ball Engineering Company, whose connection with the work, or the original contract, does not appear, had done some work and assembled some property at the site. This property was valued by the officer at $11,578 and had been excepted from the general notice to Hubbard & Company, the contractor, to remove property from the premises preparatory to work by White & Company. It was leased by the United States to White & Company, who used it in completing the work, and then returned all of it to the Government, except of course, such material as had been used in construction. In its contract with White & Company the Government had agreed to avail itself of the provision of paragraph 33 of the contract with Hubbard & Company, if requested so to do by the new contractor, and upon their request it delivered the property in question to them, but stipulated that it would not be liable therefor or on account thereof. The Ball Engineering Company sued White & Company in the District Court for the value of this property, and, upon appeal from the District Court, it was held by the Circuit Court of Appeals, 241 Fed. 989, upon authority of the Buffalo Pitts Company Case, that White &

Company were not liable, the theory of the decision being that the United States had appropriated the property under circumstances which made it liable to pay therefor. When the case reached the Supreme Court, the Government was allowed to file a brief amicus curiæ, contending that there was no such taking of the property as to render it liable, and that the action of the Ball Engineering Company sounded in tort. The opinion calls attention to the Tempel Case, supra, and follows it, with the result that the judgment of the Circuit Court of Appeals was reversed, and White & Company (and not the United States) were held to be liable for the property
44 in question. It was declared that under the circumstances stated "the implication of a contract that the United States would pay which must be the basis of its liability under the Fifth Amendment, is clearly rebutted. The liability," it is added, "of the Government, if any, is in tort, for which it has not consented to be sued" (p. 57).

In the instant case the facts show that the Government officer took possession of the shovel under what was asserted to be a claim of right to take it, founded upon an express contract, and the circumstances clearly rebut the implication of a promise to pay its fixed valuation.

As already stated, taking the property under an express contract, which created a liability for $775, is itself sufficient to rebut an implication that it was taken under an implied contract involving a liability of $5,000. See Bogert case, 2 C. Cls., 159, 165.

Whilst, strictly speaking, the plaintiffs' petition is framed on a theory that would preclude a recovery of any sum, it makes the contracts part of it, and may, therefore, be held to authorize a judgment for $775, especially in view of the stipulation to this effect. This course obviates the necessity for a new petition; but it may be added, however, that the court does not recognize a right in the parties to stipulate the questions that shall be decided upon the facts when found. They can not by stipulation confer jurisdiction of an action sounding in tort.

Judgment will be rendered in favor of the plaintiff for the sum of $775.

Hay, Judge; Downey, Judge; and Booth, Judge, concur.

GRAHAM, *Judge*, dissenting: In view of the situation which developed in this case by reason of the Government's retention of and failure to return or pay for the property it does not seem necessary to pass upon the question of whether, as a third party to the contract between the plaintiffs and Bates & Rogers Co., it secured any rights under it. The considerations and conclusions hereinafter presented do not seem to render this necessary for the reason that if the Government secured a right of option to purchase under this contract and did not exercise the option, it secured no rights and the situation is as if it had never possessed any rights under the contract. If it did not secure any rights under the contract the same situation is created. In both instances the matter comes back to the question whether the Government having had the property delivered to it under an error and misconception as to its rights by the bailee, and having retained

the property and refused to return it, is liable on an implied promise to pay its value.

It must be borne in mind that this contract did not purport and did not attempt to confer upon the United States anything but a mere privilege to purchase. It was not a sale, and for this option as between the plaintiff and the United States no consideration passed from the United States. It secured an option, if it secured anything, without having given any consideration therefor or without any consideration appearing.

"An option is not an actual or existing contract, but merely a right reserved in a subsisting argument. In a certain sense an option is a mere pollicitation, a promise without mutuality, not yet ripened into a perfect agreement. It is a proposition by one party to a contract which must be accepted in precise terms by the other in order
45 that it may be binding upon both parties." Rivers v. Oak Lawn Sugar Co., 52 La. Ann., 762.

"An option is an unaccepted offer. It states the terms and conditions on which the owner is willing to sell or lease his land, if the holder elects to accept them within the time limited. If the holder does so elect, he must give notice to the other party, and the accepted offer thereupon becomes a valid and binding contract. If an acceptance is not made within the time fixed, the owner is no longer bound by his offer, and the option is at an end." McMillan v. Philadelphia Co., 159 Pa., 142.

"An option is, in a sense, a continuing offer of a contract; and if the offeree decides to exercise his right to demand the conveyance, or other act contemplated, he must signify that fact to the offeror." Sixer v. Clark, 116 Wis., 534.

"An option is nothing more than a continuing offer to sell; but until it is accepted it does not become a contract of sale * * *. It is only when there has been an acceptance of a proposal to sell that the vendee becomes in any sense the equitable owner of the subject matter of the option." Milwaukee Mechanics Ins. Co. v. Rhea & Son, 123 Fed., 911.

"The offeree must accept within the specified time." Johnston v. Trippe, 33 Fed., 530, 536.

"Where the buyer has an option and elects to purchase he must tender the money according to the terms of the contract." Watts v. Kellar, 56 Fed., 1, 4.

"Time is of the essence of contracts of this nature." Ross v. Bank of Goldhill, 20 Nev., 191.

Assuming that the defendant had the right to purchase, it could only acquire a right of possession by complying with the terms of the option of purchase. That is to say, by first paying the price at the time fixed for the exercise of the option, which was when the whole work was completed. It failed to pay the price and took over the property nearly a month before the work was completed. It could only exercise its option at the time fixed and an attempt to exercise it before that time gave it no rights in the property. It would make no difference whether it was a day or a month before. So that in any aspect of the matter, assuming that the defendant had acquired rights

under the contract between the plaintiffs and the Bates & Rogers Construction Co., it never legally exercised those rights, and at no time acquired title to or right of possession of the property and possessed neither at the time it was taken over, the property being at that time the undisputed property of the plaintiffs.

However, assuming for present purposes the Government's right to recover as a third party under the contract between the plaintiffs and Bates & Rogers and also that the decisions of the Pennsylvania courts where the contract was made and where the property was located and where the act creating the controversy occurred do not control, let us proceed to consider the case free from these questions and on the assumption that the Government acquired an enforcible right under the contract between the plaintiffs and Bates & Rogers. It is important to have the facts here clear and to analyze them properly in order to reach a proper conclusion.

46 1. The property in question here was originally owned by the plaintiffs. It delivered it to the Bates & Rogers Co. under an informal contract of bailment for hire by which it was agreed that the Bates & Rogers Co. was to pay a rental of $25 per day and return the property at the end of the bailment period to the plaintiffs, paying the expenses of transportation and cost of shipment both ways.

2. Subsequently the parties entered into a written contract upon the statement of the Bates & Rogers Co., a cost-plus contractor with the Government, that certain provisions and forms were required by the Department. This contract was executed by the plaintiffs, and for the purposes of the discussion, it is assumed, conferred a certain right on the Government, which was not a party on the contract, as a third party.

3. What was that right? It was an option to purchase the property when the whole work under the cost-plus contract with Bates & Rogers had been completed, and not, it is to be borne in mind, when the work for which the shovel was being used had been completed. This option of purchase was to be exercised before the Government obtained any rights in the property or control over it. The price to be paid was fixed as the difference between the appraised value of the property, $5,000, and the amount of rental which had been paid up to the time that the Government exercised its right of purchase.

4. Did the Government decide to exercise its right of purchase? It did. Did it exercise that right in accordance with the provisions and terms of the contract? It did not, as the following facts will show:

Bearing in mind that it had a right of purchase upon paying the difference between the rental paid and the appraised value, which difference was $775, when did it acquire this right? When the work on the whole contract was completed. When was this work completed? It was completed about December 2. When did the Government receive the property from the bailee? About November 2, one month before the time fixed for the exercise of its option. When it received the property did it pay the price, $775, which it was required to pay in order to become the purchaser of it? It did not. Has it ever paid that price? It has not. It therefore seems clear that the Government

in failing to exercise its option according to its terms stands in the same position as if it had never had an option. It stands in the position of having received this property which was delivered to it by Bates & Rogers, the bailee, under a mistaken view of the rights of the United States, and the United States received it under a similar error.

5. If the Government had no right to receive this property, having no property interest in it, and it being still the property of the plaintiffs, and the Bates & Rogers Co. having no right to deliver it, what became the duty of the Government? As between individuals, and the Government can claim under the circumstances of this case no higher privilege or right, it would have been the duty of the party illegally receiving and holding possession of property to have returned it; and if it refused to return it and had appropriated it to its own use it would have been liable for its value under an implied contract. Did the Government return the property? It did not. Did it refuse to return it at the demand of the plaintiffs? It did. Has it since retained and used it, and appropriated it to its own
47 use? It has. It would seem under the law that under these circumstances there arose an implication of an obligation to pay the value of the property. It will therefore be readily seen that the liability of the Government grows out of its retention of the property erroneously delivered to it by the bailee and its refusal to return it, and not out of the manner in and circumstances under which it received possession.

6. How did this property come into the possession of the defendant? The Bates & Rogers Co. erroneously believing that the Government had an option of purchase wrote and asked the local representative of the Government whether the Government intended to exercise this option. The local representative recommended that the Government should, and forwarded his recommendation to the department in Washington indorsed on the letter of Bates & Rogers Co. The proper official of that department approved the recommendation and directed that the option of purchase be exercised. Thereupon the local representative by letter instructed Bates & Rogers to deliver the property to the representative of the Government in another State by shipping it there, and this was done on November 2, 1919, one month before the Government had any right to receive the property under its option of purchase. Having no right at the time of its exercise, its attempt to exercise it was void, a nullity, and created no right under the contract. Delivery of the property to the Government by Bates & Rogers one month before the legal time for the exercise of the option was unauthorized, and the retention of the property and the appropriation of it by the Government to its use was illegal in the sense that the property had been delivered to it by mistake, and its retention of possession when it had no right to possession was simply an appropriation of the plaintiffs' property to public use, without its consent.

7. What under the decisions is the legal liability of the Government under these circumstances? It received property of a third party delivered to it by mistake. It refused to return the property

to the owner and appropriated it to public use. It has received the benefit and the owner has sustained the loss. Having appropriated private property in its possession to public use there will arise an implication under the Fifth Amendment to pay just compensation, which is its fair value, and this is conceded to be $5,000. See Salomon v. United States, 7 C. Cls. 482, 7 Wall. 17; and Peck v. United States, 14 C. Cls. 84; 102 U. S. 64.

This last case was a case where property of the plaintiff, after he had refused to rent it to the Government, was taken by a subordinate officer of the Government without authority to act, without his knowledge or consent, and used for public purposes in Government work. It was a hay press. It was held that he could recover the value thereof and not the rental value. This case was decided, as stated in the opinion upon the principles announced in the case of Mason v. United States, 14 C. Cls. 59, 70, which was a case of taking property consisting of ox teams and the services of the owner in connection therewith without his consent and using them for public purposes against his protest and under threats. Justice Richardson in delivering the opinion of the court in this last case said:

"The principles of law as well as the dictates of natural justice raise an implied promise in such case to compensate the owner
48 for the use of his property, which the defendants have thus had the benefit of. It would be so in like transactions between individuals if the injured party chose to waive the tort and bring his action upon an implied assumpsit; and it is no less so when the United States are parties, since the Constitution has guaranteed to all that private property shall not be taken for public use without just compensation."

If it be urged under the facts heretofore stated that the action of the Government in retaining the property was tortious in character it is to be said that it was no more tortious than in the last two cases named, in which the principle announced in the Burchiel case, 4 C. Cls., 549, was reiterated, namely, that where private property has been taken for public use and the Government has received the benefit, and the individual sustained a loss, there is an implied contract to compensate the owner.

If this case is to be treated as a taking by the Government in the sense that after it received the property by mistake, it took it by refusing to return it to the owner, the answer is that the agent who received the property and who held it acted with authority under instructions from the War Department. The Secretary of War under the national security and defense act had authority to take this property for public use. Where the agent or representative of the Government acts with authority there can be nothing tortious in the character of the acts because it was lawful. In the very conception of a tort the basis of it is an unlawful act. In the very essence of the idea of a sovereign, it can not itself commit an unlawful act. It is the source of all law; it creates the law; its acts are law. It creates the courts, appoints the judges, and says what the law shall be.

As the Government can only act through its officers, when they act with authority their acts are the acts of the sovereign, and must be lawful. If the officer acts beyond the scope of his authority then the act is his individual act and not that of the sovereign. He commits the wrong, and not the sovereign. Thus, the sovereign can not commit a tort. If a tort has actually been committed it must necessarily result from the unauthorized act of the officer or representative of the sovereign. In each case, the officer or representative commits the tort and not the sovereign. So when the law says that the Government shall not be liable in an action sounding in tort it simply refers to the unauthorized act of some officer or representative. It can and does mean nothing else. It has been said that where there has been a wrongful act of conversion the individual can not waive the tort and sue on an implied promise, as he could do if the wrongful act had been committed by an individual. This is true for the very plain reason that the wrongful act must have been an act without authority, and consequently not the act of the Government. There was, therefore, no tort to be waived so far as the Government is concerned. The thought intended to be conveyed was that the injured party could not waive the tort for which the officer was individually liable and sue the Government on an implied promise which could not exist for the reason that there was no unlawful act so far as the Government was concerned. There was no tort to be waived as to the Govern-
49 ment, so there could be nothing upon which to base an implication of a promise to pay. In the case of Gibbons v. United States, 8 Wall., 269, the officer making the threats had no authority to use force or make threats and was acting beyond his authority.

It is true that in this case at common law, as between individuals, the retention of another's property, and the refusal to return it, or the appropriation of it to the holder's use, sounded in tort, and the action for recovery would have been in form ex delicto, but this is equally true of the Burchiel case, 4 C. Cls., 549; the Mason case, 14 C. Cls., 59; the Peck case, 14 C. Cls., 84; and the Salomon case, 7 C. Cls., 482. In these cases the Government received the goods under an invalid contract, or by the use of duress, and as between individuals at common law the action would have been in form ex delicto for the unlawful deprivation of the plaintiffs of their right of possession, but the property having been retained and used for public purposes these cases have held that an implication of an obligation to pay just compensation will arise under the Fifth Amendment. As a matter of fact, in nearly every case, in these cases just named, the Lynah case, 188 U. S., 445, and the Cress case, 243 U. S., 316, the actions under the facts, as between individuals at common law, would have been ex delicto.

This case is not controlled by the principle announced in Langford's case, 101 U. S., 341, or that in the Tempel case, 248 U. S., 121. In the former case the Government claimed ownership of the property prior to the time of taking. In this case, if there was a taking, the ownership of the property prior thereto was admittedly in the plaintiffs. As pointed out, however, this was not a taking in the sense of taking real property. This property was erroneously put in

the possession of the Government while still the property of the plaintiffs. The Government had no right to retain it, but did retain it and refused to return it and used it for public purposes, and under the circumstances of the cases cited there arose an implication of a promise to pay under the Fifth Amendment.

This case is ruled by the case of United States v. Buffalo Pitts Co., post. There the Government took and used the plaintiff's property under the belief that it had a right to do so by reason of its contract with the contractor whose work it had taken over, and on demand refused to deliver the property to the plaintiff and continued to use it. It had no legal right to retain the property or to refuse to return it to the plaintiff. The court held that the Government was liable on an implied contract as it would be presumed in taking and using the propery the implication arose that it intended to pay for its use.

In Buffalo Pitts Co. v. United States, 234 U. S., 228, 235, the court said:

"In the present case the Government had the right to contract for this work under statutory authority and to acquire property necessary to that end. Under the contract it might take possession of the construction company's property, and, it may be conceded, finish the contract with such property, but it had no right to use the property of others without compensation. * * * The mortgagee had a distinct right in the property which had accrued to it before the property was entered upon, and was authorized to take and hold the same as against the attempted transfer of the mortgagor. While the Government claimed the right to thus take and use the property, it nevertheless held it without denying the right of the owner to compensation. When it takes property under such circumstances for an authorized governmental use it impliedly promises to pay therefor."

It will be seen that this last case is a case of the Government taking or receiving from a defaulting contractor property of a third person, applying it to public use under a mistaken contractual right, and retaining it and refusing to return it, which is just the case at bar. This case is distinguished by the court in the case of Ball Engineering Co. v. White, 250 U. S., 46, from that case in that in the latter, while the property came into the possession of the Government under a mistaken right of contract, it was not retained and used for public purposes, but was surrendered into the possession of a third party who made no claim to the ownership of the property, and it was specifically stated that the Government would not be liable therefor. The Government received no benefit, and the act of surrendering it into the possession of a third party was altogether an unauthorized act of the Government officer and entirely beyond the scope of his authority. But the real distinction was that the Government did not receive the benefit and that the property was not used for public purposes.

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VIII. JUDGMENT OF THE COURT.

At a Court of Claims held in the City of Washington on the 20th day of March, A. D., 1922, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the plaintiffs and do order, adjudge and decree that Louis Klebe and Jules Klebe, copartners, trading as L. Klebe and Company, as aforesaid, are entitled to recover and shall have and recover of and from the United States the sum of Seven Hundred and Seventy-five Dollars ($775.000). By the Court.

IX. PLAINTIFFS' APPLICATION FOR AND THE ALLOWANCE OF AN APPEAL.

From the judgment rendered in the above-entitled cause on the 20th day of March, 1922, in favor of the claimants, the claimants, by their attorney, on the 9th day of June, 1922, make application for, and give notice of, an appeal to the Supreme Court of the United States. Daniel C. Donoghue, Attorney of Record.
Filed June 12, 1922.

Ordered: That the above appeal be allowed as prayed for.
June 19, 1922. By the Court.

52

[Title omitted.]

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true copies of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, opinion of the Court by Campbell, Ch. J., and of the dissenting opinion by Graham, J.; of the judgment of the Court; of the plaintiff's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this twenty-first day of June, A. D., 1922. [Seal of Court of Claims.] F. C. Kleinschmidt, Assistant Clerk Court of Claims.

Endorsed on cover: File No. 29,032. Court of Claims. Term No. 482. Louis Klebe and Jules Klebe, copartners trading as L. Klebe & Company, appellants, vs. The United States. Filed July 13th, 1922. File No. 29,032.

(8515.)

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IN THE

Supreme Court of the United States.

October Term, 1922. No. 482.

LOUIS KLEBE AND JULES KLEBE, COPARTNERS, TRADING AS L. KLEBE & COMPANY,

Appellants,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANTS' BRIEF.

STATEMENT OF THE CASE.

This is a claim for $5000 being the admitted value of a steam shovel belonging to the plaintiffs and appropriated by the United States on October 17, 1918. The Government, while admitting the value of the shovel to be $5000 at the time of its appropriation, claims first, that the taking was tortious, and secondly, if the taking was not tortious that it has the right to deduct from said value rent amounting to $4225, paid to plaintiffs by the Bates & Rogers Construction Company, for the use of the shovel, under the terms of a written agreement between the plaintiffs and Bates & Rogers, dated May 18, 1918 (Record, pp. 7-10).

The United States was not a party to the latter agreement. The United States offers the plaintiffs the sum of $775, being the difference between the value of the shovel, $5000, and the rentals of $4225, paid for its use by Bates & Rogers. The plaintiffs ask for judgment in the sum of $5000.

Bates & Rogers Construction Company entered into a contract with the United States, dated April 26, 1918, for the construction of an interior storage depot at New Cumberland, Pennsylvania. In the prosecution of its contract, Bates & Rogers desired the use of a steam shovel belonging to plaintiffs.

On May 15, 1918, Bates & Rogers arranged, through an equipment company, to lease plaintiffs' shovel for $25 per day, loading charges and freight to and from location (Findings of Fact VI, Record, pp. 12-13).

Plaintiffs made delivery of the shovel on May 18, 1918 (Record, p. 13).

On May 21, 1918, a lease of the shovel signed by plaintiffs was sent to Bates & Rogers for execution as lessee. It provided that Bates & Rogers should pay plaintiffs $25 a day rental for the shovel, commencing on the date of bill of lading showing shipment, and cease on date of bill of lading showing return, "machine to be returned in as good condition as received, allowance being made for ordinary wear and tear (Record, pp. 6 and 13).

On June 3, 1918, Bates & Rogers wrote the Terwiliger Equipment Company, which was acting as a broker or agent in negotiating the lease, enclosing a "regulation" form of contract for the shovel and states: "The contents of your contract have been incorporated in the copies which we are sending you" (Record, pp. 7 and 13).

The form of lease enclosed in the last mentioned letter was executed in June, 1918, by the plaintiffs as

lessors, and Bates & Rogers Construction Company, as lessee. The defendant was not a party to it. Under its terms the defendant claims the right of purchase of the plaintiffs' shovel for the difference between its declared value of $5000 and the rental paid to plaintiffs by the lessee, Bates & Rogers. The lease is set forth in full as Exhibit F (Record, pp. 7-10).

The lease contained the usual bailment covenants whereby the plaintiffs leased to Bates & Rogers the steam shovel in question at a rental of $25 per day, the lessee to return the equipment in as good condition as when received, ordinary wear and tear and loss by fire or inevitable accident excepted, the lessor to maintain for themselves such insurance as they may desire. The lessors declared the value of the shovels to be $5000. The lease could be assigned by the Bates & Rogers Construction Company to the United States.

In addition to the foregoing provisions, the lease also provided, in Section 8, that the lessor had made

> "himself acquainted with the provisions of Article II of said Contract of ..... 1918, between the party of the second part hereto (Bates & Rogers Construction Company) and the United States Government, and expressly agrees that all of the provisions of paragraph (c) of said Article II, shall apply to and be enforecable against the said equipment furnished and leased hereunder, to the end that the United States Government may have and exercise as to and against the said equipment all rights provided for in said paragraph (c), with respect to plant or parts thereof owned and furnished by the party of the second part hereto, the lessor to be entitled, as owner, to receive any purchase price payments which upon any appropriation of said equipment by the United States Government, under said Article II, may be coming from said Government."

Attached to the agreement of lease is a sheet of paper marked

"ARTICLE II,
"Section (c),"

which contained provisions relative to rental *actually paid by the contractor* for equipment and rental *to the contractor* for equipment *it may own and furnish,* with respect to which *latter equipment* the contractor should file with the contracting officer a schedule setting forth the fair valuation of such equipment, and then follow the provisions that when the total rental paid *to* the contractor for *such* part shall equal the valuation thereof no further rental therefor shall be paid and the title thereto shall vest in the United States; and that at the completion of the work the constructing officer may at his option purchase for the United States any part of such construction plant then owned by the contractor by paying to the contractor the difference between the valuation of such part or parts and the total rentals theretofore paid therefor.

On October 9, 1918, prior to the completion of the work and when the rentals paid to plaintiffs by Bates & Rogers had not amounted to $5000 (the declared value of the shovel), the constructing quartermaster at New Cumberland, Pennsylvania, recommended to the Chief of Construction Division at Washington, District of Columbia, that the shovel be taken over by the Government "if there is Government work to which it can be assigned." The recommendation was approved on October 14, 1918, by the Chief of the Construction Division of the War Department, and on October 17, 1918, the constructing quartermaster at New Cumberland, Pennsylvania, notified Bates & Rogers that acting upon instructions from Washington the Government's purchase privilege was exercised and the steam shovel taken over as the property of the United States, and

gave directions for the shovel to be shipped to officer in charge of construction at Mays Landing, New Jersey, to whom the shovel was to be invoiced at the difference between the agreed valuation and the rental accrued to date of transfer (Finding of Fact VIII, Record, p. 15).

> ". . . the proper Government officials caused the release of several shovels and took over only such equipment as would relieve the Government from payment of further rentals. This steam shovel was shipped from this work at New Cumberland on November 2, 1918, to Mays Landing, New Jersey, to be used on other Government work" (Finding of Fact IX, Record, p. 18).
>
> "At the time the United States took over the said shovel its fair value was $5000" (Finding of Fact X, Record, p. 18).

ASSIGNMENT OF ERRORS.

1. The lower Court erred in deciding as a conclusion of law that the plaintiffs were entitled to recover only $775.

2. The lower Court erred in not deciding as a conclusion of law that the plaintiffs were entitled to recover the sum of $5000.

3. The lower Court erred in its final judgment that the plaintiffs are entitled to recover and shall have and recover of and from the United States only the sum of $775.

4. The lower Court erred in its final judgment in not ordering, adjudging and decreeing that the plaintiffs were entitled to recover and should have and recover of and from the United States Government the sum of $5000.

BRIEF.

We contend that under the lower court's findings of fact in this case:

First. There was an authorized governmental appropriation of private property;

Second. Belonging to, and conceded by the Government to belong to, the plaintiffs;

Third. That the taking of plaintiffs' property was not tortious;

Fourth. That plaintiffs are entitled to just compensation for their property;

That if the United States concedes a right of property in the plaintiff when it appropriates his property, the recovery is not limited to the value of the right which the United States, at the time of the appropriation, conceded to be in the plaintiff, but the latter is entitled to the fair and just value of the property taken.

Fifth. That in ascertaining the amount of the compensation the Government was not entitled to set off the amount of rent paid to plaintiffs by the lessee of plaintiffs' property, under the terms of a lease to which the Government was not a party.

ARGUMENT.

FIRST. THERE WAS AN AUTHORIZED GOVERNMENTAL APPROPRIATION OF PRIVATE PROPERTY,

SECOND. BELONGING TO, AND CONCEDED BY THE GOVERNMENT TO BELONG TO, THE PLAINTIFFS.

The following findings of fact by the lower court sustain these two propositions:

(Transcript of Record, p. 12):

"IV.

"Between April 6, 1917, and November 11, 1918, the United States was engaged in a great war with the German Empire in Europe, on the high seas and in other parts of the world."

"V.

"At, and prior to May 12, 1918, Bates & Rogers Construction Company were erecting for the United States an inland storage depot at New Cumberland, Pennsylvania, for use in the prosecution of the then pending war, and in constructing said depot steam shovels were used. Said work was being performed under a contract between the Bates & Rogers Construction Company and the United States, a copy of which, marked Exhibit G, is attached to and made a part of these findings."

The contract between the Bates & Rogers Construction Company and the United States is set forth *in extenso* in the Findings of Fact, pages 18-29, from which it appears that on April 26, 1918, a written contract was made between the Bates & Rogers Construction Company, as contractor, and the United States by Colonel R. C. Marshall, "acting by order of the Secretary of War," for construction of an interior storage depot at New Cumberland, Pennsylvania, reciting

the joint resolution of Congress of April 6, 1917, that war exists between the United States and Germany causing a national emergency requiring immediate performance of work to be completed within the shortest possible time.

"VI.

Plaintiffs were the owners of an Erie Traction Steam Shovel, No. 74, which Bates & Rogers Construction Company were desirous of leasing for use in erecting the above inland storage depot.

(Transcript of Record, p. 14):

"VIII.

"The said steam shovel of the plaintiffs was appropriated by the Government as its property under the purchase privilege clause of the contract between the plaintiffs and the Bates & Rogers Construction Company and the facts pertaining to said appropriation are as follows: Major W. Morava was the constructing officer under the contract between the Bates & Rogers Construction Company and the United States and Major Henry McConnell, Quartermaster Corps, was duly authorized to act in his place and stead by the War Department. On October 2, 1918, the Bates & Rogers Construction Company sent the following letter to the constructing quartermaster at New Cumberland, Pennsylvania, which officer by the first endorsement attached to said letter forwarded the same to the War Department, which is also shown as follows:

'October 2, 1918.

'Major W. Morava,
'*Constructing Q. M., Army Reserve Depot,*
'*New Cumberland, Pa.*

'Dear Sir: You will please be advised that we anticipate being finished using Erie shovel B-74 in about fifteen days.

'This shovel, which is valued at $5,000.00, and is the property of L. Klebe & Co., Philadelphia, Pa., will have earned approximately $3,825.00 at that time.

'Kindly indicate to us whether it is the intention of the Government to exercise its purchase privilege.

'Yours truly,

'BATES & ROGERS CONSTRUCTION COMPANY.

'WD-P.'

'1st Ind.

'CONSTRUCTING QUARTERMASTER,

'*New Cumberland Pa., Oct. 9, 1918.*

'To chief of Construction Division, Washington, D. C.

'1. Forwarded for action. It is recommended that this shovel be taken over by the Government if there is Government work to which it can be assigned.

'HENRY MCCONNELL,

'*Major, Quartermaster Corps,*

'*Acting Constructing Quartermaster.*'

"The recommendation of the constructing quartermaster contained in the foregoing first indorsement was approved on October 14, 1918, by the Chief of the Construction Division of the War Department, Washington, D. C. On October 17, 1918, the constructing quartermaster notified the Bates & Rogers Construction Company as follows:

'October 17, 1918.

'Memorandum to Bates & Rogers Construction Co.

'Referring to your letter dated October 2, 1918, asking whether or not the Government intends to exercise its purchase privilege on Erie shovel E-74, valued at $5,000.00,

on which approximately $3,825.00 rental has accrued, you are advised that, acting upon instructions from Washington, we hereby exercise the Government's purchase privilege and take over said Erie steam shovel B-74 as the property of the United States.

"We are further directed to ship this shovel as soon as we are through with it here to the officer in charge of construction, Mays Landing, N. J., to whom you will invoice the shovel, charging the difference between the agreed valuation and the accrued rental at the date of transfer. This invoice should be certified by this office before being forwarded and a copy should be furnished us to be sent to Washington.

'HENRY MCCONNELL,
'Major, Quartermaster Corps,
'Acting Constructing Quartermaster.
'HMCC/W.'"

(Transcript of Record, p. 18):

"IX.

". . . the proper Government officials caused the release of several shovels and took over only such equipment as would relieve the Government from payment of further rentals. This steam shovel was shipped from this work at New Cumberland on November 2, 1918, to Mays Landing, New Jersey, to be used on other Government work."

We submit that the foregoing facts found by the lower court establish a taking of the plaintiffs' property by the Department of War in the prosecution of the then pending war and also the continued retention and use of that property by the Government for Government work.

The plaintiffs promptly declared their position in the matter and the Government was immediately noti-

fied of the plaintiffs' demand that their rights be respected, whereupon the Government again recognized the plaintiffs' right of property in the shovel, but insisted upon its appropriation and referred the plaintiffs to the Chief of Construction Division, Washington, D. C., with respect to the disputed claims as to amount of compensation. This appears from the Findings of Fact, Record, pages 16-17.

The National Defence Act of June 3, 1916, C. 134 (39 Stat. L. 166, 213), provides in section 120, that the President in time of war is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to acquire such material as may be required, and provides that the compensation for such material "shall be fair and just."

From the facts found by the lower court it clearly appears that the plaintiffs' property was appropriated by officials duly authorized to act in the matter by the War Department; that they knew of and recognized the title of the plaintiffs to the property appropriated, and that they intended and offered compensation to the plaintiffs for their property.

The Government contends that the taking was tortious and this contention was sustained in the majority opinion of the lower court.

The Appropriation of the Plaintiff's Property Was Not Tortious.

Mr. Chief Justice Campbell in his opinion (Record, p. 32) said:

> ". . . in determining the question here involved as to whether the property was taken under the implied contract, essential to plaintiffs' case, we are not required to pass upon the validity of the Government's claim of right to the property

> in question, because, as was said in the Tempel case (p. 130): 'It is unnecessary to determine whether this claim of the Government is well founded. The mere fact that the Government then claimed and now claims title in itself, and that it denies title in the plaintiffs, prevents the Court from assuming jurisdiction of the controversy.' "

In our opinion this is failing to make a distinction between a claim of title to the property taken, and a claim of a right of set-off in making compensation for the private property.

Under the decisions the Government is not liable for appropriating that which it claims to own. The Government is not, however, exempted from liability for just compensation for appropriating to public use that which it concedes is private property and for which it offers compensation.

In all the cases cited by the lower court to sustain its decision it appeared that the Government either claimed title in itself or denied title in the plaintiff:

Tempel v. United States, 248 U. S. 121, was an action for damages for dredging plaintiff's land not within the stream. The Government thought and claimed that the land was within the *de jure* stream.

It was held that there was no ground for implying a promise to compensate the owner.

Brandeis, J., page 130: "For the property applied to the public use is not and was not conceded to be in the plaintiff."

In *Hill v. United States,* 149 U. S. 593, the plaintiff asserted a title in the land in question with the exclusive right of building thereon and claimed damages of the United States for the use and occupation of the land for a lighthouse. The United States claimed

that the land was submerged under navigable waters of the United States and that since the adoption of the Constitution it acquired the paramount right to the use of the submerged land for a lighthouse without making any compensation therefor.

In holding that the Federal Court had no jurisdiction of the plaintiffs' claim, Mr. Justice Gray said, page 599:

> "It was not alleged in this petition, nor admitted in the plea, that the United States had ever in any way acknowledged any right of property in the plaintiff as against the United States."

In *Langford v. United States,* 101 U. S. 341, agents acting for the United States took possession of buildings and retained them by force under a claim that they belonged to the United States. It was held that the plaintiff could not recover.

Ball Engineering Co. v. White, 250 U. S. 46, plaintiff brought an action for damages for alleged conversion of its property used in the prosecution of work for the United States.

The defendant was put into possession of the property by the Government, and in the contract between the Government and defendant it was expressly stipulated

> "that since the ownership of the above mentioned plant and materials is not free from doubt the United States does not undertake to transfer title, does not guarantee peaceable possession and uninterrupted use. . . . Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents."

While ruling that the defendant, White Company, which procured and used the plaintiff's property, with

knowledge of the facts, should have been held liable, the Court ruled that the Government was not liable, as the facts clearly rebutted any intention on the part of the United States to pay for the plaintiff's property.

Horstmann Co. v. United States, 257 U. S. 138, was a claim for damages for what the Court of Claims found as a fact to be an unforeseen flooding of claimant's property through governmental operations.

It was held the suit could not be maintained as no intentional taking of the claimant's property by the United States could be implied.

This Court has expressed its aversion to a conclusion that the Government's use of a claimant's property was tortious and in the recent case of *United States v. Bethlehem Steel Co.*, 42 Supreme Court Reporter 335 (1922), said:

> "A contract, express or implied in fact, must, it is true, be established; but one to pay for a mechanism used will be implied rather than a tortious appropriation of it—rather than the exercise by the United States of its sovereignty in aggression upon the rights of the citizens."

We submit that the case at bar comes within the principles applied in

United States v. Great Falls Mfg. Co., 112 U. S. 645;
United States v. Buffalo Pitts. Co., 234 U. S. 228;
United States v. Cress, 243 U. S. 316;
Bothwell v. United States, 254 U. S. 231.

United States v. Great Falls Mfg. Co., 112 U. S. 645, Harlan, *J.*, page 656-7:

> "The law will imply a promise to make the required compensation where property to which

the Government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded upon any contract express or implied, with the Government of the United States."

United States v. Buffalo Pitts. Co., 234 U. S. 228, action to recover for the value of the use of a certain engine which it was alleged the United States was under an implied contract to pay. Plaintiff held a chattel mortgage on a traction engine sold to a party who was using the same in work under a contract with the Government. The contractor defaulted and assigned all its interest in the contract to the United States, which took possession of all material including the engine in question. Plaintiff made demand for the engine upon the defendant, which the defendant refused, and retained and used the property, and notified plaintiff that it would resist plaintiff's attempt to recover possession, but represented to the plaintiff that its attorney would recommend payment for its use.

Day, J. page 235:

"Under the contract it might take possession of the Construction Company's property and, it may be conceded, finish the contract with such property, but it had no right to use the property of others without compensation, and in this case it did not assume to do so. . . . While the Government claimed the right to thus take and use the property, it nevertheless held it without denying the right of the owner to compensation."

United States v. Cress, 243 U. S. 316, Pitney, *J.*, page ~~280~~ 327:

> ". . . Where, as in this case, the property owner resorts to the courts, as he may, to recover compensation for what actually has been taken, (it is) upon the principle that the Government by the very act of taking impliedly has promised to make compensation because the dictates of justice and the terms of the Fifth Amendment so require."

Bothwell v. United States, 254 U. S. 231.

The Government in the construction of a dam overflowed plaintiff's land, destroyed hay thereon and rendered it necessary for plaintiff to sell his cattle at prices below their fair value. Proceedings to condemn the land were instituted and its value paid. Plaintiff sued in the Court of Claims to recover for the loss of the hay and destruction of his business. The Court gave judgment for the value of the hay but not for the loss of business, and repeated the above quoted statement from United States v. Cress, *supra*, that "the Government by the very act of taking impliedly has promised to make compensation because the dictates of justice and the terms of the Fifth Amendment so require."

From the findings of fact in this case as quoted above (pp. 8-11), it is quite clear that the defendant knew it was appropriating property which it did not own and the title to which it conceded to be in the plaintiffs; that it expected and offered to make compensation therefor, but claimed a right with respect to the *amount* of the compensation to be paid, and the officer making the appropriation for the War Department referred the plaintiffs, as to their claim for greater compensation, to the Chief of Construction Division, Washington, D. C.

We submit that such a taking is not a tortious taking—that there is present all the essential elements to support a valid claim against the Government, to wit:

(1) An appropriation of private property for public use by parties properly authorized;

(2) Recognition of title to the appropriated property in the plaintiffs;

(3) A purpose to make payment therefor.

We think the law is clear that to entitle a plaintiff to relief under the provisions of the Tucker Act two things only need appear in his case, to wit: appropriation of his property to public use by parties properly authorized, and secondly, a recognition of the title of the private party to the appropriated property at the time of its taking. It is not necessary that a purpose to compensate should be manifested by the appropriating official at the time of the taking. The law implies that "just compensation" will be made. The view of the official taking the property that the *amount* of the compensation may be adjusted on a particular basis is wholly immaterial. The Government's view that certain elements effect the *extent* of the compensation, but do not deny the fact of compensation, may or may not be sound in law. But if the Government appropriates what it knows to be private property, the law pronounces that the owner shall receive "just compensation."

PLAINTIFFS ARE ENTITLED TO JUST COMPENSATION FOR THEIR PROPERTY.

This truism is specially referred to because in this case a judgment has been entered for the plaintiffs for $775 notwithstanding an express finding of fact that the plaintiff's property at the time it was

appropriated by the defendant had a fair value of $5000 (Finding X, Record, p. 18).

Mr. Chief Justice Campbell in opening his opinion in this case said (Record, p. 29):

> "The question for decision is whether from the facts there arises the implication of a contract, by which the Government agreed to pay $5000, the value of the shovel, as for a taking of the property of plaintiffs for public use."

We respectfully submit that the question in cases of this character is not whether from the facts there arises the implication of a contract by which the Government agrees to pay a stated sum for private property which it takes for public use, but that the question is whether from the facts there arises the implication of a contract by which the Government agrees to pay for the private property appropriated to public use. If the facts create the implication of a contract to pay, the law fixes the extent of the obligation as the fair value of the property appropriated. It may be essential as said in Harley v. United States, 198 U. S. 229, and quoted with approval in United States v. Buffalo Pitts Co., 234 U. S. at page 232 that "there must be some meeting of the minds of the parties upon the fact that compensation will be made," but no case holds that an error on the part of the Government as to the *extent* of that compensation destroys the fact of the meeting of the minds and makes the appropriation tortious.

The term "meeting of the minds" does not, in this instance, mean agreement upon the *amount* of compensation, but purpose, intent, or accord upon the *fact*, that compensation is to be made—that the Government is taking something which it knows it must pay for, not the price it is to pay.

Where there is an intention on the part of the Government to take property, concededly belonging to another, and the property is taken, there is an implied obligation to pay for the property so taken. The extent of the obligation of the United States is coextensive with the right of the party whose property is taken, to wit, the one to pay and the other to receive the fair value of the property, when taken. The duty or obligation of the one party and the right of the other cannot be avoided or lessened because the Government thought that the property could be acquired for less money than its then fair value.

If the United States, at the time of the appropriation of private property for public use, concedes a right of property therein in the plaintiff, the latter's recovery is not to be limited to the value of the right of property conceded to be in the plaintiff, but the plaintiff is entitled to fair and just compensation. The Constitution so provides and the Tucker Act was intended to enforce that right. The National Defence Act of June 3, 1916, provides for "fair and just compensation" for material requisitioned under its provisions. The Dent Act of March 2, 1919 (40 Stat. L. 1272), authorizes the Secretary of War to adjust contracts, express or implied, upon a fair and equitable basis.

It is submitted that where the Government takes property, in which it concedes the plaintiff has a right, it is an irrelevant and immaterial factor, in an inquiry to ascertain the amount of the plaintiff's claim, that the Government mistook the nature or value of the plaintiff's rights in the property taken. Having appropriated and retained the property it is liable for its value.

The "just compensation" provided for in the Constitution for the taking of private property for public

use requires that the recompense to the owner for the loss caused to him by the taking shall be measured by the loss resulting to him from the appropriation:

United States v. Grizzard, 219 U. S. 180.

When the plaintiffs' property was taken, the loss, therefore, was the fair value of their interest in the property at the time of its appropriation.

United States v. Rogers, 255 U. S. 163.

What was the interest of the plaintiffs in the steam shovel at the time of its appropriation by the defendant?

The Court has found the following fact (Transcript of Record, p. 18):

"X

"At the time the United States took over the said shovel its fair value was $5000."

Did the United States have the right to set off against that value the amount of rentals for the shovel paid to plaintiffs by Bates & Rogers Construction Company, to wit, $4225, thus reducing the value of plaintiffs' interest in the shovel at the time of its taking to $775?

The Court of Claims did not decide this point, holding that it was unnecessary to do so because the Government claimed title (Record, p. 32).

As we view this case, if the United States has the right to apply the rentals paid to the plaintiffs by the lessee of the shovel for the use thereof, then just compensation to the plaintiffs is $775, and the judgment should be affirmed.

If, on the other hand, the United States has not that right, then $5000 is just compensation and the judgment of the Court of Claims in favor of plaintiffs should be modified and increased to the sum of $5000.

THE UNITED STATES ACQUIRED NO ENFORCEABLE RIGHTS UNDER THE AGREEMENT BETWEEN THE CLAIMANTS AND BATES & ROGERS CONSTRUCTION COMPANY.

The contract under discussion is one of lease solely between the claimants and Bates & Rogers Construction Company. The latter obligated itself to pay a certain rental and return the leased article to the lessor. *The lessee had no right to acquire ownership of the leased article. It was immaterial how much rent the lessee paid to the claimants the title to the leased article, as between the actual parties to the contract, remained in the lessor. The United States was not a party to that agreement.* It did not guarantee payment of the rent by the lessee to the lessors, nor guarantee performance by the lessee of any of the latter's covenants. It in no way obligated itself to the lessors. No consideration passed from the United States to the lessors to support any enforceable rights in the United States. There was no privity of contract between the claimants and the United States created by the written contract between the claimants and Bates & Rogers Construction Company. The contract was made in the State of Pennsylvania, and was to be performed and discharged in that jurisdiction.

As the contract in question was made and discharged in the State of Pennsylvania, its nature, obligation and interpretation is to be governed by the law of that State:

Liverpool Steam Co. v. Phoenix Insurance Co., 129 U. S. 397 (1897), Gray, *J.*:

> "This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence of authority, the general rule *that the nature, the obligation and the interpretation of a contract*, are to be governed

by the law of the place where it is made, unless the parties at the time of making it have some other law in view."

In the present case, the contract was made in Pennsylvania, the lessor delivered the leased article to the lessee in Pennsylvania, the property was to be used by the lessee in Pennsylvania and was to be re-delivered by the lessee to the lessor in Pennsylvania.

The law of Pennsylvania is therefore to govern in ascertaining the rights of the parties and in determining the nature, obligation and interpretation of the contract.

The United States, not being a party to the agreement between the claimants and Bates & Rogers Construction Company, there was no privity of contract between the claimants and the United States created by the contract in question and under the facts of this case and the law of the State of Pennsylvania, and the law as announced by the Federal Courts, the United States acquired no rights under the contract between Klebe & Company and Bates & Rogers Construction Company, which it could enforce against Klebe & Company. Reference is again made to the fact that an examination of the contract between the claimants and Bates & Rogers Construction Company discloses that Bates & Rogers Construction Company, although a direct party to the contract, could not assert the rights which the United States is attempting to assert and enforce in this case. Under section 10 of the agreement, Bates & Rogers could assign the contract to the United States. It does not appear to have done so, but even if it did, the United States as assignee, could not assert the rights which it now claims.

The leading case in Pennsylvania, applying the rule that a third person, not a party to the contract, cannot maintain an action upon it, is Blymire v. Bois-

tle, 6 Watts 182. Mr. Justice Sergeant made it clear in his opinion that the ruling was in harmony with the common law, citing in support of the principle, 1 Vin. Abr. 333 to 337, the note to Piggott v. Thomson, 3 East 119, Owing v. Owings, 1 Har. and Gill 484, and other authorities, including the strikingly similar case of Howe v. Rogers, 1 Str. 592.

Blymire v. Boistle was decided in 1837, and it has been consistently followed in Pennsylvania ever since. A brief statement of some of the cases follows:

Blymire v. Boistle, 6 Watts 182.

Boistle had a judgment against Gladstone. In a conversation between Blymire and Gladstone, it was agreed that Gladstone was to convey a lot to Blymire, who was to pay Boistle the judgment Gladstone owed him. Gladstone conveyed the lot. Blymire did not pay the judgment. Boistle brought action against Blymire. It was held that as he was a stranger to the contract and to the consideration, he could not sue on it. Sergeant, *J.*, said:

> "If one pay money to another for the use of a third person, or having money belonging to another, agree with that other to pay it to a third, action lies by the person beneficially interested. But where the contract is for the benefit of the contracting party, and the third person is a stranger to the contract and consideration, the action must be by the promisee."

Campbell v. Lacock, 40 Pa. 448.

X, one of two partners, sold out to the other partner, Y, who agreed to pay all debts of the firm and to give security. The surety, B, defendant in the present suit, agreed in writing for the faithful performance of the contract by Y, the purchasing partner. The plaintiff, A, obtained a judgment against both partners for

a debt due by the late firm and being unable to collect on execution, brought this suit against the surety. It was held that the suit could not be maintained because the plaintiff was not a party to the agreement of guaranty; that the promise was not made to him or for his use and benefit; that the consideration did not move from nor had the defendant received anything in trust for him, and there was, therefore, no privity of contract.

Adams v. Kuehn, 119 Pa. 76 (1888).

Weaver Bros. were indebted to plaintiff who sued defendants on the latters' alleged agreement that in consideration of a judgment for $25,500 confessed by Weaver Bros. to defendant, the latter would pay to plaintiff his account against Weaver Bros. It was held that the suit could not be maintained.

Freeman v. Penna. R. R. Co., 173 Pa. 274 (1896).

The defendant railroad company leased the property and franchises of another railroad company and covenanted in the lease to pay operating expenses and to apply the surplus of earnings, if sufficient for that purpose, to the payment of the coupons for interest on the underlying first mortgage bonds of the lesser company previously issued.

A holder of such coupons brought a suit against the lessee company to recover the amount of the coupons.

It was held that he had no right of action as he was a stranger to the contract and the consideration.

Crown Slate Company v. Allen, 199 Pa. 239 (1901). Fell, *J.*

The defendant was the owner of 250 shares of plaintiff's stock which he sold to one Hussey under a

promise to Hussey that he, defendant, would pay into plaintiff's treasury $4 per share assessment on the stock upon call by plaintiff's board of directors. Plaintiff claimed to recover the $1000 from defendant. Held, the suit could not be maintained.

Sweeney v. Houston, 243 Pa. 542 (1914).
Brown, *J.*

Suit against two members of a firm on a note made by the firm when composed of other parties. The defendants took over the interest of a former party in the firm under an agreement that they would pay all indebtedness of the outgoing party arising from the partnership transactions. Held, that the suit could not be maintained.

The Court followed Blymire v. Boistle and after referring to the exceptions to the general rule, said per Brown, *J.*, page 546:

> "But when the promise is made to, and in relief of one to whom the promise is made, upon a consideration moving from him, no particular fund or means of payment being placed in the hands of the promisor out of which the payment is to be made, there is no trust arising in the promisor and no title passing to the third person. The beneficiary is not the original creditor who is a stranger to the contract and the consideration, but the original debtor who is a party to both, and the right of action is in him alone."

The late case of Klingler *et al.* v. Wick, 266 Pa. 1 (1920) Frazer, *J.* shows clearly that the Pennsylvania Courts have not relaxed the rule that a stranger to the contract and the consideration can not maintain an action upon it. The case is of real interest with relation to the present case.

Klingler was the owner of a warehouse. Duffy owned an adjoining lot along the far side of which was

a railroad siding which Klingler desired to use. To procure switch connection with the siding Klingler and Duffy entered into an agreement under seal, whereby Duffy agreed to let Klingler *and the railroad company* use the ground from the siding to Klingler's warehouse, "as long as said parties wish to use said switch, for which second party (Klingler) agrees to pay twenty dollars per year." The railroad company was not a party to the agreement. Duffy conveyed his lot to the defendant, Wick, subject to lease. Subsequently, after the death of both Klingler and Duffy, Wick removed the ties and rails from his (formerly Duffy's) property and prevented further use of the switch. Klingler's executors and the railroad company filed a bill in equity to restrain Wick from interfering with the use of the switch.

In holding that the railroad company could not maintain an action upon the contract, the Supreme Court said, Frazer, *J.*, pages 5 and 6:

> "The agreement is between Charles Duffy and H. J. Klingler, based upon a consideration paid by Klingler, and for the latter's benefit in providing a means of access to his premises for receiving or shpping materials and supplies incident to his firm's business. No benefit to the railroad company was contemplated other than what it would receive indirectly by virtue of services furnished as a common carrier. Consequently, the contract was not one upon which that company could maintain an action. Although, as a general rule, most jurisdictions, including our own, recognize the doctrine that a third person may maintain an action on a promise made for his benefit, *yet this doctrine is limited to cases where a third person, is either a party to the consideration or the contract created in him a legal or equitable interest entitling him to compel performance:* Blymire v. Boistle, 6 Watts 182; Kountz v. Holthouse, 85 Pa. 235; Adams v.

Kuehn, 119 Pa. 76. Unless the facts of the case are such as to bring it within these exceptions, the general rule is that no one can sue upon a contract to which he is not a party. Tested by the foregoing principles an action could not be successfully maintained upon the contract in question by the railroad company. The agreement was made for the benefit of Klingler & Company, as a means of access by rail to their place of business. The consideration moved from Klingler & Company to Duffy and the only benefit to be obtained by the railroad was an indirect one, as stated above."

There are numerous decisions in Pennsylvania in which a third party to a contract has enforced rights under it. These cases are at times referred to as exceptions to the general rule announced in Blymire v. Boistle. They are really not exceptions to that rule, but are illustrations of an entirely different rule. An examination of the facts in all these cases will disclose that some valuable right or property, not theretofore belonging to the promisor, was given to or acquired by him for a designated application to the use and benefit of the third party and the courts have *enforced the trust.*

The distinction between the two lines of cases has been made clear in numerous decisions.

In Guthrie v. Kerr, 85 Pa. 303 (1877), Mr. Justice Woodward, speaking of the decision in Blymire v. Boistle, said, page 308:

"The rule laid down in that case was that if one pay money to another for the use of a third person, or having money belonging to another, agree with that other to pay it to a third, action lies by the person beneficially interested. But where the contract is for the benefit of the contracting party, and the third person is a stranger

to the contract and consideration, the action must be by the promisee. In the one instance the promisor becomes the custodian and trustee of a fund actually belonging to the beneficiary. In the other he undertakes to pay some sum or do some act in consideration of a benefit conferred on himself."

In Adams v. Kuehn, 119 Pa. ~~15~~ 26 (1888), Mr. Justice Williams states the distinction as follows, at page 85:

> "Among the exceptions are cases where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of a promisor for that particular purpose. Also where one buys out the stock of a tradesman and undertakes to take the place, fill the contract, and pay the debts of his vendor. These cases as well as the case of one who receives money or property on the promise to pay or deliver to a third person are cases in which the third person, although not a party to the contract, may be fairly said to be a party to the consideration on which it rests. In good conscience *the title to the money or thing which is the consideration of the promise passes to the beneficiary, and the promisor is turned in effect into a trustee.*"

In the present case it will be observed

First.—That the plaintiffs did not obtain the equipment from the lessee.

Second.—That the direct parties to the contract have made application of all the money paid "as compensation for *use* of the shovel."

Third.—That the only title Bates & Rogers had was that of a lessee obligated to return the leased property to the claimants, and that was the only title they had any control over.

It is erroneous to state that the rule is peculiar to Pennsylvania. It is likewise the law in Federal Courts.

National Bank v. Grand Lodge, 98 U. S. 123, in which it was held that a corporation which assumed the payment of bonds of another association in consideration of the issue to the former of stock of the latter to the amount of the bonds assumed to be paid, could not be sued by a holder of the bonds because the latter was not in such privity with the promisor, nor had he such an interest in the contract between it and the association as to warrant a suit in his own name to compel the promising corporation to pay the bonds.

Referring to the decision in the last mentioned case, Mr. Justice Lamar in Insurance Co. v. Water Co., 226 U. S. 220 (1912) said, at page 230:

> "Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least, show it was intended for his direct benefit. For, as said by this Court, speaking of the right of bondholders to sue a third party who had made an agreement with the obligor to discharge the bonds, they 'may have an indirect interest in the performance of the undertakings, but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names.'" Nat. Bank v. Grand Lodge, 98 U. S. 123, 124; Hendrick v. Lindsay, 93 U. S. 143, 149; National Savings Bank v. Ward, 100 U. S. 195, 202, 205.

Mr. Justice Lamar, in Insurance Co. v. Water Co., 226 U. S., at page 230, stated that a stranger to a contract must show that the contract was intended for his direct benefit before he can avail himself of the exceptional privilege of suing for its breach.

In discussing the rights of a third party under a contract to which he is not a party, Mr. Justice Brown

in Constable v. National Steamship Co., 154 U. S. 51, states on page 74:

> "The contract must be made for his benefit *as its object* (italics are those of the Court), and he must be the party intended to be benefited."

He then proceeds:

> "The principle above announced was still further limited by the Court of Appeals in Vrooman v. Turner, 69 N. Y. 280, in which it was said that, to give a third party the right to sue, who may derive a benefit from the performance of a promise or action, there must be, first, intent by the promisor to secure some benefit to the third party; and, second, some privity between the two, the promisor and the party to be benefited, and some obligation or duty owing from the promisor to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent to him personally."

In the case at bar, the contract was for the benefit of the contracting party, Bates & Rogers, who desired *the use* of the claimants' shovel, and the express agreement between the parties was that the rental of $25 per day was compensation to the lessors (claimants) for lessee's *use* of the shovel. *It was upon that contract, which also required the return of the shovel to the plaintiffs by the lessee, that the plaintiffs parted with possession of their property* (Finding of Fact VI, Record, pp. 12-13).

The written agreement between the parties clearly shows that the property in question, a steam shovel, was and had been the sole property of the claimants, that the lessee, Bates & Rogers, not the United States, desired to obtain its use, and the agreement then distinctly provides that the lessee (Bates & Rogers) will pay, and the "lessor agrees to receive as and for the

lessor's *compensation for the use of said steam shovel by the lessee,* and the lessor's services hereunder a rental of $25 per diem for such equipment after the same has been shipped (as evidenced by bill of lading) until the lessee is through with the same and it has been loaded for return shipment as evidenced by bill of lading."

The rule in the Federal Courts is that for a third party to be permitted to enforce rights under a contract to which he is not a party, the "contract must be made for his benefit *as its object.*"

What was the object of the contract between claimants, as lessors, and Bates & Rogers Construction Company, as lessee? It was the use by the latter of the former's property at a certain rental from the time the property was shipped to the lessee until it was shipped back by the lessee, *and its return* to the lessor in good condition, less ordinary wear and tear. That is the real object and obligation of the contract. The rights of the United States to acquire the shovel are purely collateral *and inconsistent with the binding obligations of the contract, as between the parties thereto.*

The provisions in Section 8 of the present contract under which the Government, a stranger to the contract, claims the right to purchase the lessor's equipment for the declared valuation less total rentals paid, are repugnant to and inconsistent with the covenant of the lessee, an actual party to the contract, to return the leased equipment to the lessors in as good condition as when received, less ordinary wear and tear and damage by fire or inevitable accident; and in the meanwhile to pay the rental of $25 per day, for the *use* of the shovel, from date of bill of lading, evidencing shipment of the shovel to the lessee, to the date of the bill of lading for return shipment. The lessee's obligation to pay the rental reserved was unlimited in amount except as measured by the number of days between the

date of the two bills of lading. So far as the rights of the actual parties to the lease were concerned, the lessee could not cease payment of rent when the total rentals paid amounted to $5000.

The case is clearly one, therefore, for the application of the general principle that where two clauses are inconsistent and conflicting, they must be construed so as to give effect to the intention of the parties as collected from the whole instrument; and if one clause is at variance with another, the one contributing most essentially to the contract will be entitled to more consideration than that which contributes less:

Strauss v. Wanamaker, 175 Pa. 213; 9 Cyc. 583.

In the present case the real intent, purpose and object of the parties was for the lessor to give and the lessee to acquire the use of the lessor's steam shovel at a certain rental with an obligation on the part of the lessee to return the leased article. The contract gives the lessee no right to purchase the shovel upon any terms.

THE UNITED STATES COULD NOT RELEASE THE PLAINTIFFS FROM THEIR OBLIGATIONS UNDER THE CONTRACT.

It was argued in the lower court that a third party beneficiary may sue on a contract to which he is not a party if his release would operate as a discharge of the promisor, and that as the right to purchase the shovel by application of the rental paid by the lessee to the lessor, was vested solely in the United States, it is the only party who could release the claimant and therefore it has enforceable rights under the contract.

A release means a release of the binding obligations of the contract, the right to discharge the party

bound. The United States could not release the claimant of the real, substantial, direct binding obligations of the contract to furnish to Bates & Rogers a complete Erie Traction steam shovel in good working order for use by the lessee at New Cumberland, Pennsylvania, for the time stated at a rental of $25 per day. That was the real obligation of the contract and over that obligation the United States had no control.

If the United States, a stranger to the contract and to the consideration, acquired no enforceable rights under it, if there was no binding obligation to it—then it could release nothing. The United States was not the only party in interest. Legally it was not a party in interest. The contract is to be taken as a whole to ascertain what was its real purpose and direct object. Suppose, during the operation of the contract, the United States released the claimants from its alleged rights to purchase the shovel under the terms of the contract—would that have relieved the claimants from their real obligations under the contract? Subjected to the tests laid down in the Federal and Pennsylvania cases, the United States occupies a distinctly secondary position in the contract, and, therefore, not being a party, it acquired no enforceable rights.

The attention of the Court is directed to the provisions of Article VI, Section (e) of the contract of April 26, 1918, between Bates & Rogers Construction Company, as contractor, and the United States, of which contract Article II, Section (c), now relied upon by the Government, is a part. Article VI, Section (e), provides (Record, p. 25):

> "Special Requirements. The Contractor hereby agrees that it will . . . (e) . . . insert in every contract made by it or the furnishing to it of services, materials, supplies, machinery and equipment, or the use thereof, a pro-

vision that such contract is assignable to the United States; will make all such contracts in its own name, *and will not bind or purport to bind the United States or the contracting officer thereunder.*"

. . . . . .

There was no consideration passing from the United States to plaintiffs.

It was argued in the lower court that a consideration moved from the United States to the plaintiffs by virtue of the Act of Congress of February 24, 1905, (33 Stat. 811) providing that a party supplying labor or material to one having a contract with the United States for the prosecution of any public work may look to the bond entered by the contractor for payment, subject to the priority claim of the United States.

It is obvious, however, that the plaintiffs possessed the right to pursue the surety on the primary contractor's bond by virtue of the act of Congress and not by virtue of the alleged option to purchase in the contract between plaintiffs and Bates & Rogers Company. The plaintiffs would have possessed their right to intervene in a suit by the United States on the contractor's bond, or to have instituted their own suit, in accordance with the provisions of the act, entirely independent of any alleged rights or options in the United States in the contract between Bates & Rogers and the plaintiffs, and even if the shovel had been furnished to Bates & Rogers under an informal verbal agreement, containing no reference to the United States. The test of the right of a sub-contractor to the benefits of the Act of Congress, approved February 24, 1905, is whether he has furnished labor or materials to a contractor for the prosecution of a public work for the United States.

ASSUMING, HOWEVER, THAT THE UNITED STATES ACQUIRED ENFORCEABLE RIGHTS UNDER THE CONTRACT OF LEASE BETWEEN THE CLAIMANTS AND BATES & ROGERS CONTRUCTION COMPANY, WHAT WERE THOSE RIGHTS AND WERE THEY ENFORCEABLE AT THE TIME THE UNITED STATES APPROPRIATED THE CLAIMANTS' PROPERTY?

Article II of the contract between the Bates & Rogers Construction Company and the United States pertains to the cost of the work to the United States and provides generally that the contractor shall be reimbursed, in the manner described, for such of its actual net expenditures in the performance of the work as may be approved or ratified by the contracting officer and as are included in various items, with most of which we are not concerned.

Item (a) relates to all labor, material, machinery, etc.; (b) all sub-contracts; (c) (upon which the Government relies in the present case) relates entirely to rentals and divides the rentals into two kinds. The first paragraph of Section (c) relates to rentals actually *paid by the contractor* for construction plant in sound and workable condition, such as pumps, steam shovels and such other equipment as may be necessary for the proper and economical prosecution of the work.

The second paragraph of Section (c) relates to "rental *to the contractor for such construction plant or parts* thereof *as it may own and furnish,*" and provides: "When *such* contruction plant or any part thereof shall arrive at the site of the work, the contractor shall file with the contracting officer a schedule, setting forth the fair valuation at that time of each part of *such* construction plant. . . . When and if the total rental paid to the contractor for any *such* part shall equal the valuation thereof, no further rental

therefor shall be paid to the contractor and title *thereto* shall vest in the United States. *At the completion of the work* the constructing officer may at his option purchase for the United States any part of such construction plant then owned by the contractor by paying to the contractor the difference between the valuation of such part or parts and the total rentals theretofore paid therefor."

It will be observed that in the contract between the Bates & Rogers Construction Company and the United States, there was no provision for the declaration of the fair valuation of *equipment furnished to the contractor* nor any provision whatever for the acquisition by the United States of equipment for which rental was actually paid by the contractor for equipment leased to the contractor by third parties.

Provisions for valuation of equipment and acquisition of the same by the United States related *solely to equipment owned and furnished by the contractor.*

The contract of lease, however, between the claimants, as lessors, and the Bates & Rogers Construction Company, as lessee, attempts to subject the equipment leased thereunder to the provisions of Article II, paragraph (c) of the agreement between the Bates & Rogers Construction Company and the United States "to the end that the United States Government may have and exercise as to and against the said equipment all rights, provided for in said paragraph (c) with respect to plant or parts thereof owned and furnished by the party of the second part hereto the lessor to be entitled, as owner, to receive any purchase price payments which upon any appropriation of said equipment by the United States Government, under said Article II, may be coming from said Government."

As heretofore pointed out, Article II, Section (c) of the contract between the Bates & Rogers Construction Company and the United States provided for the acquisition by the latter of title to such part or parts of the construction plant as was owned and furnished by the contractor in either one of two cases:

First.—When the total rental paid to the contractor equaled the valuation thereof, then title should vest in the United States;

Second.—At the completion of the work the United States had the option to purchase any part of such contruction plant *then owned by the contractor* "by paying the difference between the valuation of such part and the rental theretofore paid therefor."

The lower Court has found as a fact that the rentals paid to plaintiffs were only $4225 and as a further fact that the work had not been completed until after November 6, 1918 (Record, p. 18). The shovel was appropriated by the Government on October 17, 1918 (Record, p. 15), and shipped on November 2, 1918, from New Cumberland to Mays Landing, New Jersey, "to be used on other Government work" (Record, p. 18).

Conclusion.

It is respectfully submitted that the facts found by the lower Court establish a Governmental appropriation of plaintiffs' property, conceded to belong to the plaintiffs, at the time of the appropriation, and then worth $5000, and that in ascertaining fair and just compensation for the value of the property at the time of its appropriation the Government is not entitled to deduct the amount of rentals paid to plaintiffs by the lessee of the property appropriated.

It is submitted that the action of the lower Court in entering judgment for the plaintiffs for $775, should be modified and judgment entered in favor of plaintiffs for $5000.

Respectfully submitted,

DANIEL C. DONOGHUE,
Attorney for Louis Klebe and Jules Klebe, Co-partners, trading as L. Klebe & Company, Appellants.

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AUTHORITIES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

LOUIS KLEBE AND JULES KLEBE, Co-partners, trading as L. Klebe & Company, appellants,
v.
THE UNITED STATES. } No. 482.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is an appeal from a decision of the Court of Claims holding that the plaintiffs could not recover from the United States on the basis that the United States had requisitioned the plaintiffs' steam shovel and had thereby impliedly agreed to pay the plaintiffs the fair value of their shovel. The United States, claiming that it had taken the plaintiffs' shovel through the exercise of a contract right which it had to purchase the same, admitted that $775 was due the plaintiffs on account of the purchase price of the shovel, and the court entered judgment for this amount.

On April 26, 1918, the United States entered into a cost-plus contract with the Bates & Rogers Construction Company for the construction by this company

of a quartermaster interior storage depot at New Cumberland, Pennsylvania. (R. 12.)

In Article II of this contract the United States agreed to reimburse the contractor for certain enumerated items of expenditure. By paragraph (c) of Article II, the United States was to reimburse the contractor for "rentals actually paid" by the contractor for construction equipment used in the work, including steam shovels, at rates not in excess of an annexed schedule of rental rates. By paragraph (c) the contractor was also to be paid rental at the rates mentioned in the attached schedule of rental rates for equipment which the contractor "may own and furnish" for use in the work. The contractor was required to file with the contracting officer of the United States a schedule of the fair valuation of all equipment upon its arrival at the site, and these valuations were to be deemed final unless seasonable objection was made by the contracting officer. (R. 20.) Paragraph (c) further provided:

> When and if the total rental paid to the Contractor for any such shall equal the valuation thereof, no further rental shall be paid to the Contractor, and title thereto shall vest in the United States. At the completion of the work, the Constructing Officer may at his option purchase for the United States any part of such construction plant then owned by the Contractor by paying to the Contractor the difference between the valuation of such part or parts and the total rental theretofore paid therefor. (R. 20.)

In May, 1918, the plaintiffs agreed to lease to the Bates & Rogers Construction Company an Erie Traction Steam Shovel, No. 74, for use in the construction work at New Cumberland, Pennsylvania, at a rental of $25 per day. The plaintiffs delivered such shovel there on May 18, 1918. (R. 12.) On June 3, 1918, Bates & Rogers forwarded to the plaintiffs a lease for the use of their steam shovel, and this lease was subsequently executed by both parties. (R. 13.) In Section 9 of the lease the plaintiffs, lessor, certified and declared the value of the steam shovel to be $5,000. (R. 9.) Section 8 of the lease reads as follows:

> The Lessor has made himself acquainted with the provisions of Article II of said Contract of ——— ———, 1918, between the party of the second part hereto and the United States Government, and expressly agrees that all of the provisions of paragraph (c) of said Article II, shall apply to and be enforceable against the said equipment furnished and leased hereunder, to the end that the United States Government may have and exercise as to and against the said equipment all rights provided for in said paragraph (c), with respect to plant or parts thereof owned and furnished by the party of the second part hereto, the Lessor to be entitled, as owner, to receive any purchase price payments which upon any appropriation of said equipment by the United States Government, under said Article II, may be coming from said Government. (R. 9.)

A copy of paragraph (c) of Article II of the contract between the Bates & Rogers Construction Company and the United States was physically annexed to the lease entered into between the plaintiffs and the construction company. (R. 13, 10.)

The plaintiffs' steam shovel was used at New Cumberland from May 18, 1918, to November 2, 1918, inclusive. Rental for this period at $25 per day, amounting to $4,225, was paid by the United States to the Bates & Rogers Construction Company and in turn paid by that company to the plaintiffs. (R. 14.)

The Court of Claims found as a fact that the plaintiffs' steam shovel was appropriated by the Government as its property under the purchase privilege clause of the contract between the plaintiffs and the Bates & Rogers Construction Company. (Finding VIII, R. 14.) On November 2, 1918, the shovel was shipped by the Government to Mays Landing, New Jersey, to be used there in other Government work. (R. 18.) The circumstances of this appropriation were as follows:

On October 2, 1918, the contractor, the Bates & Rogers Construction Company, notified the Government constructing officer at New Cumberland that the work on which the plaintiffs' shovel was being used was nearing completion and that at such a time the shovel would have earned approximately $3,825, and inquired "whether it was the intention of the Government to exercise its purchase privilege." (R. 15.)

The Government constructing officer forwarded the above notification to the War Department at Washington with the indorsement, "It is recommended that this shovel be taken over by the Government if there is Government work to which it can be assigned." This recommendation was approved by the War Department on October 14, 1918. (R. 15.) The constructing officer then notified the contractor that, "acting upon instructions from Washington, we hereby exercise the Government's purchase privilege and take over said Erie steam shovel B–74 as the property of the United States." The contractor was further notified that directions had been given to ship the shovel to the officer in charge of construction at Mays Landing, N. J., "to whom you will invoice the shovel, charging the difference between the agreed valuation and the accrued rental at the date of transfer." (R. 15.)

The contractor on October 28 notified the plaintiffs of this action. On November 5 the plaintiffs replied to the contractor that they did not recognize any right of the Government to appropriate their shovel "upon payment of an agreed valuation less earned rentals," and that "our contract with you was not made subject to the terms of any contract you had with the Government." (R. 16.)

The foregoing letter was brought to the attention of the Government constructing officer, who wrote the plaintiffs on November 6, 1918, that "the Government has taken over your shovel No. 74 as distinctly provided in the contract." Plaintiffs were advised

to present any claim they had to the contrary to the War Department at Washington. (R. 16 and 17.)

The work of constructing the interior storage depot at New Cumberland was completed early in December, 1918. The class of work on which the steam shovels were used was completed subsequent to November 6, 1918, on which date about 95 per cent of the excavating work had been done. (R. 18.)

The fair value of the plaintiffs' shovel at the time it was taken by the United States was $5,000. (R. 18.)

The United States has at all times been ready and willing to pay the plaintiffs the sum of $775 pursuant to the rights which it asserts under the contract between the plaintiffs and the Bates and Rogers Construction Company. (R. 18.)

ARGUMENT.

I.

The United States did not enter into an implied contract to pay the fair value of the shovel.

A. *The officers taking the shovel had no statutory authority to appropriate it on behalf of the United States.*

The present suit was brought in the Court of Claims, which has jurisdiction of claims against the United States based upon contracts express or implied. The plaintiffs do not rely upon an express contract with the United States, but contend that an implied contract to pay the fair value of their shovel arose by reason of the taking of their shovel.

When an officer of the United States duly authorized by Act of Congress to appropriate property takes property for the public use without asserting on behalf of the United States any right in the property, the courts imply a contract between the United States and the owner that the former will pay the fair value of the property taken. *United States* v. *Lynah*, 188 U. S. 445, 462; *United States* v. *Great Falls Manufacturing Company*, 112 U. S. 645.

The United States, however, is not bound by unauthorized acts of its officers. If no act of Congress authorizes appropriation for the public use of a given kind of property, its use by a Government officer will be a tortious act. For such a tortious act there can be no recovery against the United States upon a contractual basis. (*Hooe* v. *United States*, 218 U. S. 322.)

Even where Congress has authorized appropriation of private property for the public use, the United States will not be bound in contract to pay the fair value of such property unless it is established that the property was taken by or through the particular officer upon whom Congress conferred the power of appropriation. In *United States* v. *North American Trading Company*, 253 U. S. 330, this Court held that although Congress had empowered the Secretary of War to take land for barracks and quarters for troops, the action of the general commanding the Department of Alaska in taking land for these purposes did not give rise to an implied con-

tract upon which the United States could be sued, since the Secretary of War had not authorized this officer to act in his behalf in taking the land. The court said (p. 333):

> In order that the Government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power.

In the present case no Act of Congress authorized the appropriation of the plaintiffs' shovel for the public use. The only Act of Congress which might seem to give color of authority for such taking is Section 120 of the National Defense Act of June 3, 1916 (39 Stat. 213). By this section the President in time of war is empowered through the head of any Department of the Government to place an order with any individual or firm for such product or material as may be required, and which is of the nature and kind usually produced by such individual or firm. Compliance with all such orders for products or materials is made obligatory and given precedence over all other orders or contracts previously placed with such individual or firm. The section further authorizes the President to take possession of and to operate any plant capable of producing war supplies which has refused to carry out orders for war supplies placed with it by the Secretary of War.

Section 120 has no application to the present case, since the United States did not place an order with

the plaintiffs for their steam shovel, but rather directly took possession of their shovel. The authority given by Section 120 to place compulsory orders for the production or delivery of products or materials does not give authority to make a direct appropriation of private property for the public use. The section recognizes the distinction between these two kinds of authority by providing that when orders for necessary war supplies are not complied with the President may then take possession of and operate the manufacturing plant which has refused production.

Even if Section 120 of the National Defense Act be construed to give authority to appropriate the plaintiffs' shovel, the plaintiffs can not recover in the present case because they have not shown that the officers who physically took possession of their property were authorized so to do "by the official upon whom Congress conferred the power." The authority given in Section 120 is to the President, acting through the heads of the Departments. The Court of Claims has made no finding that the officers who physically took possession of the plaintiffs' shovel had received authority from the Secretary of War to act for him in appropriating plaintiffs' shovel under Section 120. If such authority is not established, the plaintiffs can not recover from the United States on the basis of an implied contract to pay the fair value of their shovel. (*North American Trading Company* v. *United States, supra.*)

B. *The officers taking the shovel asserted contract rights inconsistent with an implied promise to pay its fair value.*

When property is taken pursuant to an Act of Congress and no claim to a right in the property is asserted on behalf of the Government at the time of the taking, the law implies a promise by the United States to pay just compensation. When this implied promise has once been made, a later denial of liability by the Government does not destroy the implied contract which has arisen.

No such promise can be implied when at the time of the taking the Government asserts that it takes pursuant to a property right in the thing taken or pursuant to contract rights therein. It is immaterial in this connection whether or not the claim of the Government is well founded. The assertion of the right makes it impossible to imply that the Government promises to pay compensation as for property appropriated for the public use, since such a promise is to be implied only from the circumstance that the Government in taking the property has tacitly admitted that it has no right thereto except such as it may obtain by the exercise of its power of appropriation.

In *Tempel* v. *United States*, 248 U. S. 121, the United States dredged certain submerged lands for the improvement of navigation on the Chicago River. The United States did this work without knowing that the lands had become submerged through certain private excavations previously made without

the consent of the owners of the lands. Suit to recover the value of the lands thus taken was brought in the United States District Court, sitting as a Court of Claims. This court held that since the United States took the lands in the belief that they lay under a navigable river and that they could therefore be taken for the improvement of navigation without payment of just compensation, no promise to pay compensation for these lands could be implied and no suit ex contractu could be brought against the United States. The court also specifically held in this case that it was unnecessary to determine whether or not the property rights asserted by the United States at the time of the taking were valid.

In *Tempel* v. *United States, supra*, the United States did not claim fee to the lands which it used in its work of improving navigation. The opinion of the court states (p. 129) that under the law of Illinois neither the United States nor the State owns the lands under a navigable river, but that riparian owners own the fee to the middle of the stream. The case therefore holds that although the United States does not claim ownership of the property taken, nevertheless if the United States at the time of taking makes claim to a right which is inconsistent with a promise to pay the owner just compensation, no implied promise to pay such compensation arises and no suit ex contractu can be brought against the United States.

In the present case the United States asserted that it took the plaintiffs' shovel pursuant to a contract

right to purchase it for $5,000, less the amount of rentals paid for the use of the machine. The Court of Claims found as a fact that the plaintiffs' shovel "was appropriated by the Government as its property under the purchase privilege clause of the contract between the plaintiffs and the Bates & Rogers Construction Company." (Finding VIII, R. 14.) The correspondence set forth in the findings of the Court of Claims fully substantiates the foregoing conclusion of fact reached by the court. To say that the United States in taking the plaintiffs' shovel impliedly promised to pay its fair value irrespective of prior rental payments is in direct conflict with the express assertions made at the time of the taking by the officers acting for the United States in this matter.

The opinion of the Court of Claims states the case as follows (R. 32):

> To claim that by the very act of exercising this asserted right to purchase for $775 the Government made itself liable, upon an implied contract, to pay $5,000, involves a contradiction of terms. It ignores any distinction between express and implied agreements, and confuses that class of contracts which grow out of the dealings of parties with the distinct class of implied contracts arising from the exercise of the sovereign right of eminent domain because of the Fifth Amendment.

Hawkins v. *United States*, 96 U. S. 689, shows that where parties act under an express contract the courts will not imply a promise by one of the parties with respect to matters covered by the express contract.

In the Hawkins case the claimant contracted to deliver to the United States certain rubblestone for the construction of a public building. The claimant, pursuant to the demand of the assistant superintendent of the work, delivered more expensive stone than that called for by his contract. He sued to recover the fair price of the stone delivered, but this court held him entitled only to the contract price. It said, page 697:

> Express stipulations can not in general be set aside or varied by implied promises; or, in other words, a promise is not implied where there is an express written contract, unless the express contract has been rescinded or abandoned, or has been varied by the consent of the parties.

In the present case the United States asserted that it acted pursuant to a contract right to purchase plaintiffs' shovel. Under the doctrine of the Hawkins case no promise inconsistent with the rights asserted under an express contract can be implied. The promise to pay just compensation for private property is implied only when the United States purported to appropriate property for the public use. The basis for such an implication is lacking when, as in the present case, the United States expressly denies that it is appropriating property in the exercise of the right of eminent domain.

This court has denied contractual liability by the United States under circumstances more favorable to the claimant than those existing in the present

case. In *Horstmann Company* v. *United States*, 257 U. S. 138, the claimants sued in the Court of Claims to recover compensation for the flooding of their soda lakes. This Court assumed that a Government irrigation project had caused the flooding, but held that since this result could not reasonably have been foreseen when the work was commenced there was no basis for implying a promise by the Government to pay compensation for the injured property. The Court said, page 146:

> It is to be remembered that to bind the Government there must be implication of a contract to pay, but the circumstances may rebut that implication.

Since the court has denied a promise to pay just compensation where there is merely circumstantial evidence against the implication of such a promise, there is the greater reason in the present case to deny any promise to pay just compensation when at the time of the taking rights were asserted which were inconsistent with any promise to pay just compensation for the property taken and used in the public service.

II.

The United States acquired the shovel pursuant to a valid contractual right of purchase.

The United States purchased the plaintiff's shovel under Section 8 of the contract between the plaintiffs and the Bates & Rogers Construction Company. Paragraph (c) of Article II of the contract between the United States and the Bates & Rogers Construc-

tion Company gave the United States the option to purchase "any part of such construction plant then owned by the Contractor." Section 8 of the contract between the plaintiffs and the construction company subjects the plaintiffs' shovel to the provisions of paragraph (c) of Article II of the earlier contract "to the end that the United States Government may have and exercise as to and against the said equipment all rights provided for in said paragraph (c), * * * the Lessor to be entitled, as owner, to receive any purchase-price payments which upon appropriation of said equipment by the United States Government, under said Article II, may be coming from said Government."

Section 8 gives the United States the option of purchasing the plaintiffs' shovel upon the same terms that it may, under paragraph (c) of Article II of the earlier contract, exercise an option of purchasing equipment owned by the Bates & Rogers Construction Company and used on the construction work. To contend that Section 8 gave an option of purchase only with respect to equipment owned by the Bates & Rogers Construction Company is to render Section 8 void and meaningless.

The plaintiffs have contended that the contract between the plaintiffs and the Bates & Rogers Construction Company must be interpreted by the law of Pennsylvania, and that by the law of that State a third party beneficiary can not enforce rights given him by a contract to which he is not a party. (Appellants' Brief, pp. 21 to 28.)

While the Pennsylvania courts have stated that third-party beneficiaries can not sue to enforce their rights, numerous exceptions to the general rule have been recognized. Page on Contracts, 2nd Ed., Sec. 2385, states:

> In Pennsylvania the general rule seems to be that the beneficiary can not maintain an action upon a contract for his benefit. Such a rule is, however, subject to a number of exceptions * * *. It is said that a beneficiary can sue if a release would operate as a discharge of the promisor, but not if it would leave the promisor liable to the promisee.

In *Kountz* v. *Holthouse*, 85 Pa. 235, 237, the court said:

> Yet many cases are to be found in which the right of a third person to sue has been sustained on a promise made to another. * * * This right of action is not restricted in cases of money only; but extends to an agreement to deliver over any valuable thing, so that such third person is the only party in interest.

A leading Pennsylvania case in which a third party beneficiary was allowed to recover is *McBride, Administratrix*, v. *Western Pennsylvania Paper Company*, 263 Pa. 345. The facts in that case were that Bowman held a judgment against McBride and execution against certain land owned by McBride had issued on the judgment. Bowman refused to sell the judgment to the defendant unless it agreed to pay to McBride half the net profit which might

be realized on a resale of the land. This agreement was made and the court allowed McBride's Administratrix to recover from the defendant half the net profit realized on a resale of the land. It said, page 349:

> Though no consideration moved from McBride or his family, as beneficiaries under the contract they were entitled to maintain an action thereon.

It appears that under Pennsylvania law a third party beneficiary can sue if he is the only party in interest so that his release will discharge the promisor from the obligation in question. The plaintiffs contend (Appellants' Brief, pp. 32, 33) that this exception is not applicable to the present case, since the United States could not discharge the plaintiffs from their obligations under the contract made between the plaintiffs and the Bates & Rogers Construction Company.

The obligations of Section 8 are separable from the body of the obligations of the contract of which it is a part. The test of the Pennsylvania court as to the rights of third party beneficiaries should be applied, not to the entire obligations of the contract, but to the separable obligations of Section 8. As to Section 8 the United States and the plaintiffs are the only parties in interest and a release by the United States would dicharge the plaintiffs from the obligations of that section. The option of purchase given the United States by Section 8 is therefore valid under the law of Pennsylvania, and the United States

acquired the plaintiffs' shovel by exercise of the option of purchase given by that section.

The judgment of the Court of Claims in favor of the plaintiffs for the sum of $775 should be affirmed.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.
ALBERT OTTINGER,
Assistant Attorney General.
CHARLES H. WESTON,
Special Assistant to the Attorney General.

APRIL, 1923.

○

affirmed.

KLEBE ET AL., COPARTNERS, TRADING AS L. KLEBE & COMPANY, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 78. Argued October 16, 17, 1923.—Decided November 12, 1923.

1. A contract implied in fact is one inferred from circumstances or acts of the parties; an express contract speaks for itself and excludes implications. P. 191.
2. Where the Government, relying on a purchase-privilege clause of a construction contract, appropriated a steam shovel, used in the

work, which the contractor had leased from another, *held*, that the shovel-owner's cause of action against the United States was either in tort, which could not be maintained under the Tucker Act, or upon the express contract, for payment as therein provided; but that a contract to pay the value of the shovel could not be implied. *Id.*

57 Ct. Clms. 160, affirmed.

APPEAL from a judgment of the Court of Claims, awarding the appellants damages under an express contract but refusing to recognize their larger claim of implied contract.

Mr. Daniel C. Donoghue for appellants.

Mr. Assistant Attorney General Ottinger, with whom *Mr. Solicitor General Beck* and *Mr. Charles H. Weston,* Special Assistant to the Attorney General, were on the brief, for the United States.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Appellants, plaintiffs below, were the owners of a traction steam shovel, which they leased to the Bates & Rogers Construction Company for $25 per day. At the time of the lease and prior thereto the Construction Company was engaged, under contract, in certain work for the United States for which the shovel was procured and used. Article II, paragraph (c) of the contract under which the work was done provided that the Construction Company should be reimbursed for rentals actually paid for steam shovels, at rates which were named, the company being required to file with the contracting officer of the Government a schedule setting forth the fair valuation of each part of the construction plant at the time of its arrival at the site of the work. This valuation was made final except upon a contingency which is not material here. The paragraph further provided that when the total

rental paid by the Government for any such part should equal its valuation, no further rental should be paid and title thereto should vest in the United States. At the completion of the work the contracting officer was by the contract given the option to purchase for the United States any part of the plant then owned by the Construction Company by paying the difference between the valuation thereof and the total amount of rentals theretofore paid.

A written instrument leasing the steam shovel to the Construction Company was executed by the plaintiffs and the Construction Company, which, among other things, recited that plaintiffs had made themselves acquainted with the provisions of Article II of the contract between the Construction Company and the United States, which plaintiffs agreed should "apply to and be enforceable against the said equipment furnished and leased hereunder, to the end that the United States Government may have and exercise as to and against the said equipment all rights provided for in said paragraph (c), with respect to plant or parts thereof owned and furnished by the party of the second part" (the Construction Company); the plaintiffs "to be entitled, as owner, to receive any purchase price payments which upon any appropriation of said equipment by the United States Government, under said Article II, may be coming from said Government." The valuation of the shovel stated in the lease was $5,000. Basing his action expressly upon the provisions of the lease incorporating paragraph (c), and after $4,225 in rentals had been paid upon the shovel, the contracting officer, properly authorized to do so, exercised the option of the Government and took over the steam shovel as its property. This was done a short time before the completion of the work. The plaintiffs were notified but insisted that the lease did not authorize this action. The record shows that the Government has been ready and willing at all times to pay the difference ($775)

between the valuation of the shovel and the amount of rentals paid.

Plaintiffs insisted that the United States was not privy to the leasing contract and brought suit to recover the value of the shovel, viz., $5,000, upon the theory that it had been taken by the Government for public use and that thereby an implied obligation arose on the part of the Government to pay just compensation therefor. The court below, one judge dissenting, found that the property was taken under the express contract, creating a liability for $775 only, and, therefore, no implication of a promise could be indulged. Judgment for plaintiffs for this amount was rendered.

In *United States* v. *North American Co.*, 253 U. S. 330, this Court said (p. 335): "The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment, *Schillinger* v. *United States*, 155 U. S. 163, 168; *Basso* v. *United States*, 239 U. S. 602, but upon the existence of an implied contract entered into by the United States. *Langford* v. *United States*, 101 U. S. 341; *Bigby* v. *United States*, 188 U. S. 400; *Tempel* v. *United States*, 248 U. S. 121, 129; *United States* v. *Great Falls Manufacturing Co.*, [112 U. S. 645,] *supra*; *United States* v. *Lynah*, [188 U. S. 445, 462, 465,] *supra*." But the circumstances may be such as to clearly rebut the existence of an implied contract, *Ball Engineering Co.* v. *White & Co.*, 250 U. S. 46, 57; *Horstmann Co.* v. *United States*, 257 U. S. 138, 146, as here, where possession of the property was taken under an asserted claim of right to do so by virtue of an express contract. It is said that the claim is not well-founded, but that is not material. In *Tempel* v. *United States*, 248 U. S. 121, 130, this Court said: "It is unnecessary to determine whether this claim of the Government is well-founded. The mere fact that the Government then claimed and now claims title in itself and that it denies title in the plaintiff, prevents the

court from assuming jurisdiction of the controversy. The law cannot imply a promise by the Government to pay for a right over, or interest in, land, which right or interest the Government claimed and claims it possessed before it utilized the same. If the Government's claim is unfounded, a property right of plaintiff was violated; but the cause of action therefor, if any, is one sounding in tort; and for such, the Tucker Act affords no remedy." The parties here stipulated and the Court of Claims found that the property "was appropriated by the Government as its property under the purchase privilege clause of the contract between the plaintiffs and the Bates & Rogers Construction Company." A contract implied in fact is one inferred from the circumstances or acts of the parties; but an express contract speaks for itself and leaves no place for implications. See *King* v. *Kilbride*, 58 Conn. 109, 117; *Brown* v. *Fales*, 139 Mass. 21, 28. To sustain the contention that the express contract is not binding or enforceable in favor of the Government and consequently that its claim here is not well founded would not help the plaintiffs, since then the resulting cause of action would be one sounding in tort and not within the purview of the Tucker Act. *Tempel* v. *United States, supra.* In this view of the matter it becomes unnecessary to consider whether the privilege of purchase was prematurely exercised.

The Court of Claims did not dismiss the petition but rendered judgment in accordance with the terms of the express contract. Whether this action was proper under the pleadings we do not stop to inquire since the Government has not appealed therefrom and its liability under the express contract is admitted. The judgment is

Affirmed.